86-927

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GERTRUDE WILKS, L.A. BRECKENRIDGE,
ARN CENEDELLA, EULESLEY REECE,
EDWARD JOHNSON, LEON ABERNATHY,
JOE SANDERS, ROY LEE ASHFORD,
MARY L. OWENS WHITE AND GRANT WHITE,
Petitioners,

VS.

BARBARA A. MOUTON, RUBEN ABRICA,
FRANK OMOWALE SATTERWHITE,
JAMES A. BLAKEY, JR.,
CITY OF EAST PALO ALTO AND COUNTY OF SAN MATEO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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November 18, 1986

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QUESTIONS PRESENTED

1. In a local election decided by 15 votes, were voters' constitutional protections against dilution and debasement of their votes violated by State approval of a procedure allowing opposing campaign workers, including a candidate, to obtain absentee ballots for elderly, physically-disabled and illiterate voters in a predominantly-minority, low income area and then go unsolicited to their homes, including a federally-assisted home for the elderly, and there make out the absentee ballots of 17 voters and "assist" 28 others to make out their ballots?

2. Does such procedure involve an unconstitutional invasion of a voter's right to vote his or her ballot in secrecy?

LIST OF PARTIES

In addition to the parties hereto as listed in the caption, the following have made appearances as amicus curiae:

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To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court of the
United States

Petitioners Gertrude Wilks, et al. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Supreme Court entered in the above-entitled proceeding on August 21, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 42 Cal.3d 400, and is reprinted in the appendix hereto, at page A-1, infra.

The opinion and modification thereof of the Court of Appeal filed August 29, 1984, was not reported, but copies thereof are reprinted in the appendix hereto, at pages A-17 and A-45, infra.

The Judgment, Findings of Fact and Conclusions of Law of the trial court were not reported, but copies thereof are reprinted in the appendix hereto, at page A-47, infra.

JURISDICTION

The judgment and opinion of the Supreme Court of California, California's highest court, was entered on August 21, 1986. No rehearing was sought.

Jurisdiction is believed conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States provides: "nor shall any State deprive any person of life, liberty or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On June 7, 1983, an election was held in the unincorporated community of East Palo Alto to determine whether it should become a city.

Approximately 18,000 people resided in this low-income, predominantly-minority community; many voters were elderly, physically-disabled and/or illiterate.

Petitioners Gertrude Wilks et al. opposed incorporation; a citizens group, "East Palo Alto Citizens Committee for Incorporation" (EPACCI) worked actively for incorporation.

The ballots cast in precinct polling places on election day opposed incorporation by a 79 vote margin, 1,678 opposed and 1,599 in favor. Of the 272 absentee ballots, however, 183 were cast for incorporation and only 89 against, the 2-to-1, 94 vote difference turning defeat into victory for the EPACCI forces by a 15 vote margin.

Thus, on June 14, 1983, the County of San Mateo certified the incorporation measure as having been passed 1,782 to 1,767, a margin of 15 votes.

Petitioners duly filed an election contest under California law, challenging primarily some 94 absentee ballots garnered by EPACCI workers in the weeks preceding the election.

The trial court upheld the election against petitioners' contest, but the California Court of Appeals reversed, on U.S. and California constitutional grounds, remanding the case to the trial court for determination as to how 94 absentee ballots had been cast.

The grounds for petitioners' protest and for the Court of Appeals ruling is perhaps best described in the words of the Court of Appeal itself:

> "... the undisputed evidence reveals that an aggressive campaign was waged by EPACCI in support of the incorporation measure."
>
> "EPACCI leaders not only provided voters with absentee ballot application forms, but also actively assisted many voters—some of whom were admittedly elderly, physically disabled, illiterate or unfamiliar with ballot forms and accompanying instructions— during the actual voting process."
>
> "In light of the serious challenge to a cherished right inherent in our national political heritage, we must carefully scrutinize the claimed improprieties, as our high court recently noted in *Peterson v. City of San Diego*, supra, 34 Cal.3d 225, 229-230: (citing, inter alia, six U.S. Supreme Court decisions, *Dunn v. Blumstein*, 405 U.S. 330, *Reynolds v. Sims*, 377 U.S. 533, *Yick Wo v. Hopkins*, 118 U.S. 356, *Harman v. Forssenius*, 380 U.S. 528, *Carrington v. Rash*,

385 U.S. 89, and *Schneider v. State of New Jersey*, 308 U.S. 147)." (See Appendix, at page A-24.)

"Having these precepts in mind, we are unable to escape the conclusion that, on the facts of the present record, indisputably the secrecy of some ballots was compromised. Thus, campaign workers systematically visited the residences of voters, often after having supplied them with absentee ballots, and either personally instructed the voter in the use of the computer ballot during the voting process or actually punched the ballot card for the voter. Seventeen ballots were punched by campaign workers for EPACCI rather than the voter; indeed some of these voters never actually perused or even received their ballot cards, although they did sign a ballot envelope for an EPACCI representative. Twenty-eight ballots were cast with the assistance of and in the presence of EPACCI representatives."

"Unlike the trial court, we can find no justification in the fact that some of such voters may have requested the assistance of campaign workers: many others did not, but were nevertheless in effect forced to a decision under intimidating circumstances, in the presence of campaign officials."

"In the case at bench, however, while it appears that some 'assisted' voters were disabled, many others were not, but nevertheless received heavy-handed and we think improperly-suggested if not outrightly coercive assistance, all in derogation of constitutional guarantees of secrecy and privacy in voting."

"Since we have concluded that the 'assistance' provided by EPACCI campaign workers, which in some cases virtually—and in rarer instances actually—resulted in voting by proxy, in its totality constituted a serious breach of the constitutional right to secrecy of voting, we reluctantly decide that all ballots in which EPACCI campaign workers participated in the voting process either by actually punching the ballot form or, in the voter's presence, assisting a voter in doing so, must be voided."

The California Court of Appeal also voided, on California statutory grounds, 15 absentee ballots mailed to the address of EPACCI workers, and 46 other absentee ballots hand-carried by EPACCI workers to the County Clerk, thus essentially upholding petitioners' challenge to almost the exact number of absentee ballots (94) which had changed the defeat of the incorporation measure into a victory.

The Court of Appeals' decision not only relied on the six U.S. Supreme Court cases cited above, but also relied on California statutory provisions against mail delivery of absentee ballots to other than the voter and hand delivery of completed ballots by 3rd parties, provisions which the Court found to be intended to protect the secrecy of the ballot and integrity of the voting process. The Court further relied on a series of prior California decisions, particularly citing an appellate decision on which the U.S. Supreme Court had denied certiorari where a concurring justice had said:

> "... Preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election."

Fair v. Hernandez, 116 Cal.App.3d 868 (1981) cert. den. 454 U.S. 941.

A second *Fair v. Hernandez*, 138 Cal.App.3d 578 (1982) had invalidated eleven critical absentee ballots on the basis that the statute's purpose in prohibiting 3rd party delivery of absentee ballots was to preserve "the secrecy, uniformity and integrity of the voting process," *Fair*, supra, page 582.

The Court of Appeals also cited another provision in California's statutory scheme for protecting the secrecy of the ballot, Elections Code § 26945, making it a felony to interfere with the secrecy of voting. (See Appendix, at page A-23.)

All of these authorities, both state and federal, were deemed inapplicable by the California Supreme Court which relied instead on the trial court's findings that no fraud had occurred in the absentee voting process and that the voters involved had consented to the conceded intrusion on the secrecy of their votes.

In short, the California Supreme Court validated the same procedure which the Court of Appeals had found to violate both U.S. Constitutional protections and state law; in so doing the Court made no reference whatsoever to the federal constitutional issues involved.

The federal constitutional issue had been presented at each stage of proceedings at trial and on appeal.

Petitioner's initial Preliminary Pretrial Memorandum to the trial court, reprinted in the appendix at page A-72, infra, stated (at page A-73):

> "The issue is one of a voter's constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted, *Hadley v. Junior College Dist.*, 397 U.S. 50, 52 (1970)."

The trial court's Findings and Conclusions, reprinted in the appendix at page A-50, infra, ruled specifically against petitioners on the constitutional equal protection, due process, secret ballot and privacy issues. (See page A-65.)

Petitioners' Reply Brief in the Court of Appeals, reprinted in the appendix, at page A-82, infra twice cited *Hadley*. (Appendix, pages A-97 and A-100.)

In petitioners' brief to the California Supreme Court, reprinted in the appendix at page A-115, infra, the final conclusion again cites *Hadley*:

"In making their arguments, Petitioners devote a great deal of their arguments to the point that it is in the best interests of the people of East Palo Alto that the incorporation vote be upheld; they totally ignore the constitutional right of dissenting voters, likewise upheld by the U.S. Supreme Court, not to have their votes wrongfully denied, debased or polluted by the illegally-cast vote of another. *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970)." (See page A-144.)

REASONS FOR GRANTING THE WRIT

The California Supreme Court's decision squarely challenges the principle of the cases culminating in *Hadley et al. v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 25 L.Ed.2d 45, 90 S.Ct. 791 (1969).

> "This Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote is protected by the United States Constitution against dilution or debasement." [*Hadley*, supra, at page 54].

The Court concluded:

> "We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election." [*Hadley*, supra, at page 56].

Any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. at 555-562.

The foregoing fundamental principle justifies insertion after the words "to vote" the words "in secret."

If false ballots diluting the influence and value of honest ballots are voidable (see *Anderson v. United States*, 417 U.S. 211, 216), ballots where the secrecy and privacy of the voter is infringed are equally pernicious.

The procedures followed in East Palo Alto, given the stamp of approval of the California Supreme Court, represent an open invitation for future invasions of privacy and the secrecy of the voting process, not to mention its integrity.

As stated in the concurring opinion of Justice Grodin:

"It is inevitable that political and special interest groups will be tempted to 'assist' voters in casting their ballots, perhaps at organizational parties at which the marking and mailing of ballots constitutes a group activity." (See Appendix, page A-15, Concurring Opinion of Grodin, J.)

Lower courts have extended the *Hadley* principle to protection of voters against unfairness in state election procedures.

In *Duncan v. Poythress*, 657 F.2d 691, (5th Cir. 1981) the court said:

> "Although we recently decided that the fourteenth amendment provides no guarantee against innocent irregularities in the 'administration of state elections', . . . the guidance offered by cases such as *Griffen* and *Briscoe*, point the way to our holding today that the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the election process." [*Duncan*, supra, at pages 699-700.]

In *United States v. Morado*, 454 F.2d 167 (5th Cir. 1972), eight individuals were convicted under the federal conspiracy statute, 18 U.S.C. 241, for "joining together for the purpose of causing a number of improperly delivered, improperly returned, and improperly marked absentee ballots, and applications therefor, to be processed in that election." (*Morado*, supra, p. 169)

In *Morado*, campaign partisans undertook much the same activity as did the pro-incorporation partisans in East Palo Alto, improperly playing upon the elderly, illiterate and infirm through a process of improper delivery and improper return of ballots and ballot application materials involving acquisition of the ballots during unsolicited visits by the partisans, often "during which a reluctant voter would be influenced to sign an application for absentee ballot, and be told how to mark his ballot, or would have his ballot marked for him." [*Morado*, supra, at p. 171).

CONCLUSION

The procedures in East Palo Alto which the California Supreme Court has validated seriously undermine the fairness of the election process and violate the due process and equal protection clauses of the 14th Amendment.

The *Hadley* rule should be broadened to specifically protect voters from the dilution and debasement of their votes by any coercive intrusion on the privacy and secrecy of their fellow voters. Every voter should be free from having to deal with an eager campaign worker or candidate on his or her doorstep, anxious to "assist" with the casting of the voter's absentee ballot.

Respectfully submitted,

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November 18, 1986

APPENDIX

In the Supreme Court of the
State of California

S.F. 24814
(Ct. of Appeal 1/1 A024878)
(Super. Ct. No. C-275654)

Gertrude Wilks et al.,
Plaintiffs and Appellants,

vs.

Barbara A. Mouton et al.,
Defendants and Respondents.

[Filed August 21, 1986]

BY THE COURT*

Appellants seek to invalidate a municipal incorporation election on the ground that there were irregularities in the handling of certain absentee ballots. The trial court found that there had been no violation of any mandatory provision of the Elections Code or tampering with or fraud involving the ballots, and it confirmed the passage of the incorporation measure. We agree.

On June 14, 1983, the San Mateo County Board of Supervisors declared that a measure to incorporate the community of East Palo Alto had passed by a margin of 15 votes: 1,782 voters being in favor and 1,767 opposed. Two hundred seventy-two votes were cast by absentee ballot; these ballots favored incorporation by a ratio of nearly two to one. Appellants filed a statement of contest on grounds of misconduct by election officials and illegal voting, challenging 147 votes. In addition, the County of San Mateo filed a statement contesting three votes on residency grounds. The trial court rejected appellants' challenges to all but five votes which were cast by nonresidents. The court also invalidated the three votes challenged by the county, and confirmed passage of the

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* BIRD, C.J., MOSK, J., BROUSSARD, J., REYNOSO, J., LUCAS, J., LILLIAN KWOK SING, Judge of the Municipal Court, City and County of San Francisco, assigned by the Chairperson of the Judicial Council.

incorporation measure by a margin of thirteen votes, as well as election of four challenged city council members.

Appellants assert that at least 94 of the absentee ballots were illegally cast because of the manner in which the ballots were obtained and delivered, because there had been a breach of the right of secret balloting, and because of the alleged nonresidence of certain voters.

"It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. [Citations.] Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. [Citations.]" (Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430.) Even mandatory provisions must be liberally construed by avoid thwarting the fair expression of popular will. (Kenworthy v. Mast (1903) 141 Cal. 268, 271; Willburn v. Wixson (1974) 37 Cal.App.3d 730, 736.) In addition, there is an express legislative policy requiring liberal construction of absentee ballot provisions in favor of the absent voter. (Elec. Code, § 1001.)[1] The contestant has the burden of proving the defect in the election by clear and convincing evidence. (Smith v. Thomas (1698) 121 Cal. 533, 536; Hawkins v. Sanguinetti (1950) 98 Cal.App.2d 278, 283; Willburn v. Wixson, *supra,* 37 Cal.App.3d at p. 737.) We are, of course, bound by the trial court's determination of the facts except to the extent that they are not supported by substantial evidence. (Willburn v. Wixson, *supra,* 37 Cal.App.3d 730, 737; Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 278, p. 289.)

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[1] All statutory references are to the Elections Code.

A. *Delivery of Absentee Ballots.*

Fifteen voters submitted applications for absentee ballots[2] and listed the residence or business address of Joseph Goodwill[3] as the place to which the ballot should be mailed. The county clerk mailed the ballots to the specified addresses. Eight voters picked up their ballots at Mr. Goodwill's office. Two voters who were relatives of Mr. Goodwill picked up their ballots at his home. Mr. Goodwill delivered the remaining five ballots to voters at their homes.

Appellants argue that these 15 ballots should not be counted because the clerk violated section 1007, which provides in pertinent part that "[i]f the official deems the applicant entitled to an absent voter's ballot he or she shall deliver by mail or in person the appropriate ballot." Appellants argue that this provision requires that ballots be mailed only to the voter's residence, and that it prohibits third parties from delivering the ballot to the voter.

Appellants' contention that section 1007 prohibits the election official from mailing a ballot to a qualified voter at an address other than his residence is plainly meritless. Nothing in section

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[2] Any registered voter may vote by absentee ballot: he or she must file an application "signed by the applicant . . . show[ing] his place of residence." (§ 1002.) The application must contain, among other things, the printed name and residence address of the voter as it appears on the affidavit of registration, the address to which the ballot is to be mailed and the voter's signature. (§ 1006.) On timely receipt of the application, the elections official "should determine if the signature and residence address on the ballot application appear to be the same as that on the original affidavit of registration." (§ 1007, subd. (a).) Then, "[i]f the official deems the applicant entitled to an absent voter's ballot he or she shall deliver by mail or in person the appropriate ballot." (§ 1700, subd. (b).)

[3] Joseph Goodwill is president of the East Palo Alto Chamber of Commerce and a well-known member of the community who was active in favor of incorporation. He was not an official member of the East Palo Alto Citizens Committee on Incorporation (EPACCI), a group formed to promote the incorporation of East Palo Alto.

1007 indicates such a requirement. In fact, related sections of the absentee ballot provisions specifically allow the voter to name a mailing address different from his residence. (See §§ 1006 [absentee ballot application must provide for residence address and address to which the ballot is to be mailed], and 1451 [applicant for permanent absent voter status must indicate address where ballot to be mailed, if different from the place of residence].)

Also unpersuasive is appellants' argument that a third party whose address the voter has specified for delivery of his ballot may not deliver the absentee ballot to a voter. Appellants can point to no specific provision prohibiting third-party delivery when the voter has directed the election official to deliver his ballot to an address other than his residence. They refer us to an opinion of the Attorney General finding that section 1007 does not authorize delivery of absentee ballots to "authorized representatives" of the voter; we remain unpersuaded. The Attorney General stated that because section 1017 specifically allows delivery of absentee ballots to third-party designated representatives when a disabled or absent voter missed the usual time limit for applying for an absentee ballot, the Legislature must have intended that this third-party delivery not be available when the voter meets the deadline. (62 Ops.Cal.Atty.Gen. 439, 442 (1979).) We find this interpretation of legislative intent inconsistent with the Legislature's caveat that the absentee-voter provisions be interpreted liberally in favor of the absent voter. (§ 1001.) The Legislature clearly contemplated that the voter could choose to receive his absentee ballot at a place other than his residence; naturally this choice could mean that a person other than the voter would actually receive the ballot. Since the Legislature authorized voters to receive ballots at a place other than their residence, we can assume that the Legislature anticipated that in some cases a third party would convey the ballot to the voter. We certainly cannot find any mandatory provision the breach of which would permit disenfranchising these 15 voters. As the trial court found, each of these voters actually received their absentee ballots and there was no tampering with them. We recognize that there is some potential for abuse if campaign workers and candidates gain undue control of the distribution of absentee ballots, but elimination of this risk is a legislative task.

B. *Ballots Voted in the Presence of or With the Assistance of Incorporation Proponents.*

Appellants contend that the secret voting provision of the California Constitution[4] was violated in the case of 45 absentee ballots voted in the presence of or with the assistance of 3 incorporation proponents. Appellants further allege that the conduct of the three incorporation proponents constituted criminal interference with the secrecy of voting in violation of section 29645.[5]

Joseph Goodwill distributed approximately 79 absentee ballot applications. He later visited many of these people and asked whether the ballot had been received, and whether the voter had completed and returned the ballot to the county clerk. In most cases the voter was either a member of Mr. Goodwill's family or a friend of long standing.

The trial court adopted the following findings with respect to the voters assisted by Mr. Goodwill: "In some instances the voter asked Mr. Goodwill for instructions about the absentee ballot procedure. In some instances, because of age, physical disability or lack of familiarity with the computer card, the voter asked Mr. Goodwill for help completing the absentee ballot. In yet other instances, the voter had completed the ballot and gave it to Mr. Goodwill to return to the County Clerk. In some instances the voter had already completed and returned the absentee ballot to the County Clerk. In those instances where Mr. Goodwill helped complete the absentee ballot, he did so in privacy, in the presence

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[4] Article II, section 7 states: "Voting shall be secret."

[5] Section 29645 provides: "Any person is guilty of a felony, punishable by imprisonment in a state prison for two, three, or four years who, before or during an election: [¶] (a) Tampers with, interferes with, or attempts to interfere with, the correct operation of, or willfully damages in order to prevent the use of, any voting machine, voting device, voting system, or vote tabulating device. [¶] (b) Interferes or attempts to interfere with the secrecy of voting. [¶] (c) Knowingly, and without authorization, makes or has in his or her possession a key to a voting machine that has been adopted and will be used in elections in this state."

of the voter, with the voter's understanding and consent. Occasionally, one or more members of the voter's family were present, with the voter's consent. All the ballots were punched to reflect the voter's decision on the candidates and on [the incorporation measure]. After the ballot was completed, each voter signed the ballot envelope."

Mrs. Carmaleit Oakes is a 77-year-old retired school teacher who was active in EPACCI. She visited five voters, some of whom apparently had requested assistance from EPACCI in completing their absentee ballots.

The trial court adopted the following findings with respect to the voters assisted by Mrs. Oakes: "[Mrs. Oakes] was invited into their homes. She offered to help them with their absentee ballots. They all accepted her offer. All five people discussed their votes with her and voluntarily showed their ballot materials to her. At their request, because of lack of familiarity with the computer card, she helped four voters complete their absentee ballots in the privacy of their own homes. She helped complete all four ballots with the voters' understanding and consent and in accordance with the voters' wishes. Each completed ballot correctly reflected each voters' choice of candidates and each voters' decision on [the incorporation measure]. After the ballot was completed, each voter signed the ballot envelope.... The fifth voter... completed her own absentee ballot.... Mrs. Oakes took the completed ballots of these five voters to EPACCI headquarters. No one tampered with any of these ballots."

Mr. Frank Omowale Satterwhite is a former chairman of the San Mateo County Planning Commission, a member of the East Palo Alto City Council and the owner of a consulting firm. He was an active member of EPACCI, and his name appeared on the ballot as a candidate for city council. Mr. Satterwhite assisted several voters residing at Runnymede Gardens, a federally subsidized senior citizens residential facility. Following a request by several residents for help with their absentee ballots, Brad Davis, the resident manager of Runnymede Gardens, asked that a representative of EPACCI come to the facility to explain the absentee voting process.

The trial court adopted the following findings with regard to the voters assisted by Mr. Satterwhite: "Mr. Frank Omowale Satterwhite came to Runnymede Gardens for the meeting and helped six voters with their absentee ballots. All six voters requested help. All who showed their ballots to Mr. Satterwhite did so voluntarily. Four of these people asked Mr. Satterwhite to complete their absentee ballots. Because of her age or disability, they could not punch out the holes in the absentee ballot computer cards themselves. . . . Mr. Satterwhite carefully [*sic*] ascertained their wishes, punched out the ballots according to the voter's instructions and showed the punched ballot to the voter.[6] Mr. Satterwhite's assistance was provided with the voters' understanding and consent and the voters all signed the ballot envelopes. Mr. Satterwhite gave these absentee ballots to Brad Davis, along with those of [two other residents] who completed their own ballots."

The trial court found that in each case where an incorporation proponent had assisted a voter in completing an absentee ballot, the assistance had been provided at the voter's request. The court also found that the assistance had been provided without fraud or coercion, and that all disclosures had been made voluntarily by the voter. Finally, the court concluded that no ballot had been tampered with, and that in all cases the vote cast reflected the decision of the voter.

These factual findings are supported by substantial evidence and will not be disturbed on appeal.[7] Appellants argue that even

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[6] Mr. Satterwhite testified that he was especially sensitive to the fact that he was assisting voters with ballots on which his own name appeared as a candidate. In order to avoid "any aura of impropriety" he refused to respond to any questions regarding the candidates and simply referred the voters to their election materials. He did not advise any voter as to how their vote shoud be cast.

[7] Although appellants never directly attack the trial court's factual findings, they quote extensively from testimony which in the trial court they argued was evidence of improper conduct. Although the evidence presented at trial was sharply conflicting, we must consider the evidence in the light most favorable to the prevailing party, giving such party the benefit of every reasonable inference, and resolving all conflicts in

accepting the trial court's findings as true, the intrusion by campaign workers on the secrecy of voting requires that the ballots be invalidated even where disclosures are voluntary and in the absence of tampering. We disagree.

Article II, section 7 of the California Constitution states: "Voting shall be secret." This does not mean that every ballot including absentee and mailed ballots must actually be cast in secret; we recently rejected such an argument in Peterson v. City of San Diego (1983) 34 Cal.3d 225. In that case plaintiffs argued that an election conducted by mail ballot is invalid because the voter in such an election may show his ballot to another person. We noted that with respect to protection of the secrecy of the ballot, provisions for mail balloting and absentee balloting are substantially the same, and that the absentee ballot provisions have been held consistent with the constitutional provision. (*Id.*, at pp. 228, 231; see Beatie v. Davila (1982) 132 Cal.App.3d 424, 431.) We emphasized the fundamental nature of the right to vote and noted the efforts of the Legislature to extend the exercise of the franchise by enacting liberal provisions for voting by absentee ballot. "We are satisfied that the secrecy provision of our constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting. We may not assume that the secrecy provision was designed to serve a purpose other than its obvious one of protecting the voter's right to act in secret, when such an assumption would impair rather than facilitate exercise of the fundamental right." (34 Cal.3d at p. 230.)

Two Court of Appeal opinions recognize that absentee ballots validly may be cast in the presence of or with the assistance of third parties. In Fair v. Hernandez (1981) 116 Cal.App.3d 868, the court refused to invalidate two absentee votes cast with the assistance of family members, when the voters were partially physically disabled. The court held that the statutory restrictions on who may provide assistance to disabled voters at polling places do not apply to absentee voting. (*Id.*, at p. 879; see §§ 14234,

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support of the judgment. (9 Witkin, Cal Procedure, *supra*, Appeal, § 278, p. 289.) The trial court's findings here are clearly supported by substantial evidence.

14235, 14236.) And in Beatie v. Davila, *supra,* 132 Cal.App.3d 424, the Court of Appeal rejected a challenge to absentee votes cast in the presence of partisan campaign workers. In that case, defendant's campaign committee conducted an aggressive absentee ballot campaign, soliciting people to sign requests for absentee ballots and then returning to the voters' residences to pick up the ballots. The court held that the conduct of the committee members did not violate the voters' right to secrecy: "[I]f a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate's representative, he should be permitted to do so. To hold otherwise would cast a pall on absentee voting. We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the elections official or the polling place. Such a voluntary disclosure cannot be deemed to violate the constitutional mandate." (*Id.*, at p. 431.)

Appellants argue on the basis of our opinion in Scott v. Kenyon (1940) 16 Cal.2d 197, that when there has been a breach of secrecy and an opportunity for fraud in the collection of absentee ballots, the ballots must not be counted. But *Kenyon* does not help appellants. There, the voters did not waive the right to a secret ballot. It was election officials who violated that right after the voters had turned their ballots in. An election official removed identifying tags from absentee ballots which had already been delivered to the clerk, opened them and read off the name of the voter and the votes cast without allowing anyone to corroborate his reading, and put the ballots and envelopes in an insecure ballot box. This box was actually tampered with and ballots removed before the votes could be canvassed. These procedures violated statutory provisions for the storage, counting and secrecy of ballots once received by election officials. It was not merely he opportunity for fraud, but these wholesale violations, along with the evidence of actual tampering and the impossibility of determining with certainty how the challenged votes had been cast that compelled us to conclude that the absentee ballots could not be counted. (*Id.*, at pp. 201, 203-204.)

The statutory provisions regulating absentee voting do not prohibit the voter from permitting third parties to be present

while the voter marks his ballot. Neither do these provisions specify what class of absentee voter may use third parties to actually mark the ballot. The trial court found that each voter had voluntarily allowed the campaign workers to be present while the voter marked the ballot, and had requested whatever assistance was provided in marking the ballots. The trial court found that each ballot was marked as the voter had requested and that there was no coercion or tampering. Appellants' request that we nonetheless invalidate each of the votes cast because it was not cast in secret is inconsistent with our obligation in reviewing a contested election to protect the individual's exercise of the franchise in the absence of manifest illegality.

We realize that the integrity of an election is impaired when partisan campaign workers coerce absentee voters to give up their right to vote in secret. But the trial court determined upon the basis of substantial evidence that no such coercion occurred here. As we noted in *Peterson,* the Legislature has adopted criminal sanctions to secure the integrity of elections. "It is a crime to interfere with a voter lawfully exercising the right to vote at an election (Elec. Code, § 29612), to offer employment or any gift or lodging as an inducement for voting or refraining from voting (Elec. Code, §§ 29620-29624), to coerce or to intimidate any voter (Elec. Code, § 29630) or to interfere with the secrecy of voting (Elec. Code, § 29645)." (Peterson v. City of San Diego, *supra*, 34 Cal.3d at p. 231.)[8] In addition, the Elections Code prescribes rules intended to assure the secrecy and integrity of absentee ballots. (See, e.g., §§ 1009 [notice on absentee ballot envelope that it is to be opened only by canvassing board], 1015 [election official to compare signature on absentee ballot envelope with signature on affidavit of registration], see also 17007 [any ballot marked by voter so that it can be identified as his shall not be counted].) If it is perceived that there are defects or ambiguities in the legislative scheme for absentee voting which leave a potential for abuse, the Legislature must respond.

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[8] We accept the trial court's determination that no such coercive activity took place here.

C. *Ballots Delivered to the Elections Official by a Third Party.*

Several EPACCI members accepted completed absentee ballots from various voters and delivered them to EPACCI campaign headquarters. Onyango Bashir, Chair of EPACCI's voter registration committee, personally delivered 46 ballots to the ballot box on the counter in the county clerk's office between May 9, 1983, and May 24, 1983. The ballots were not tampered with. The deputy county clerks in charge of the room allowed voted absentee ballots to be deposited in the ballot box by anyone. On May 24, 1983, the assistant county clerk informed the deputy clerks that absentee ballots could only be delivered by the voter. He had been aware of this rule on May 9 but had not had time to tell the clerks before. On the same day the deputy clerks told Mr. Bashir that he could not place the voted absentee ballots in the ballot box, but would have to mail them. He took them outside the building, put stamps on them and put them in the mailbox. Mr. Bashir was during this time a deputy county clerk deputized to assist in the conduct of elections; the county clerk administered an oath of office but did not instruct him how to handle absentee ballots or that he could not personally deliver them to the ballot box.

Appellants contend that the 46 absentee ballots which Mr. Bashir personally delivered to the ballot box must be invalidated because they were delivered in violation of section 1013. They also challenge the ballot cast by Lanette Cody whose sister delivered her ballot to an election official.

Section 1013 provides in pertinent part: "After marking the ballot, the absent voter may return it to the official from whom it came by mail or in person, or may return it to any member of a precinct board at any polling place within the jurisdiction." We agree with appellants that section 1013 directs the voter to return the completed ballot personally if he decides not to use the mail, and that the section does not contemplate the voter's use of a third party to deliver the ballot. (See Fair v. Hernandez (1982) 138 Cal.App.3d 578 [Fair II]; see also Peterson v. City of San Diego, *supra,* 34 Cal.3d 225, 228 and Beatie v. Davila, *supra,* 132 Cal.App.3d 424, 429.) We do not agree, however, that the voters' and deputy county clerks' inadvertent violation of this provision

requires that we disenfranchise the voter in the face of a trial court finding that there was no fraud or tampering with the challenged ballots. As we said above, the trial court found that in each case the third party delivered the ballot at the voter's request and after the voter had signed and sealed the envelope and that there was no tampering. The deputy clerks accepted all the ballots because their supervisor had not had time to tell them not to accept them from third parties.

We do not agree with the Court of Appeal in *Fair II* that the bar to third-party delivery of absentee ballots is so fundamental to the preservation of the integrity of elections that we must invalidate an absentee ballot delivered by a third party in the face of a trial court determination that there has been no fraud or tampering. We note that third parties are permitted to mail absentee ballots for the voter or deliver ballots to the polling place on election day, and that this is not considered to undermine the integrity of elections.[9] (Beatie v. Davila, *supra,* 132 Cal.App.3d 424, 429; Bolinger, Cal. Election Law During the 60's and 70's, 28C West's Ann. Elec. Code (1977 ed.) p. 123.) Disabled absentee voters who miss the deadline for requesting absentee ballots by mail may designate an authorized representative to receive the blank ballot and return the completed ballot to an elections official or polling place. (§ 1017.) The Legislature evidently did not consider that this form of third-party delivery would undermine the integrity of elections.

We regard section 1013 as essentially directory in nature. We do not believe that it "goes to the substance or necessarily affects

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[9] This is a perfect illustration of the injustice in nullifying votes because of noncompliance with technical and sometimes ambiguous rules governing the absentee balloting process. When Mr. Bashir was informed at the clerk's office that the office would no longer accept ballots delivered by third parties, he simply walked outside and deposited the ballots in a mailbox. According to appellants, had Mr. Bashir handed these ballots to the clerk instead of putting them in the mailbox, the integrity of the elections process would have been compromised to a degree requiring invalidation of the ballots. We do not think the expression of popular will should be nullified in such an arbitrary manner.

the merits or results of the election." (Rideout v. City of Los Angeles, *supra,* 185 Cal. 426, 431.) Noncompliance with directory provisions of the Elections Code will not nullify a vote unless the irregularity prevented " 'the fair expression of popular will' " (Canales v. City of Alviso (1970) 3 Cal.3d 118, 127) or the "result of the election has been changed or rights of the voters [were] injuriously affected by the deviation." (Rideout v. City of Los Angeles, *supra,* 185 Cal. at p. 430.) The trial court's findings clearly show that neither occurred here. Under these circumstances, where there has been no fraud, tampering or coercion, departure from the technical requirements of the statute will not disenfranchise voters who had no knowledge that they had failed to comply.

D. *Other Challenges.*

Appellants originally challenged 115 votes for alleged residence violations, but reduced this number to 39 near the end of trial. The trial court sustained five of these challenges and denied the remainder. Appellants renew their residency challenge to 17 votes. This challenge turns on factual determinations properly made by the trial court. The court determined that appellants had failed to prove that any of the 17 voters had lost his or her domicile in the precinct in which he or she was registered before the election. Substantial evidence supports the trial court's finding.

Appellants also challenge 16 ballots returned in envelopes where the residence address did not match the address on the voter's affidavit of registration. We agree with the trial court that section 1015 requires only that the elections official compare the signature on the identification envelope with the signature on the affidavit of registration; a comparison of addresses is not required.[10]

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[10] Section 1015 provides in pertinent part: "Upon receipt of the absentee ballot the elections official shall compare the signature on the envelope with that appearing on the affidavit of registration and, if they compare, deposit the ballot, still in the identification envelope, in a ballot container in his or her office."

The trial court determined that there had been no fraud, coercion or tampering in connection with any of the challenged ballots. The court determined that every voter who had disclosed his ballot to a third party had done so voluntarily. Most voters who disclosed their ballots did so because they needed help in view of their age, infirmity or illiteracy. There was substantial compliance with the essential provisions of the absentee voter provisions of the Elections Code. Under these circumstances we will not deprive the individuals who cast the challenged ballots of the exercise of their fundamental right to vote.

The judgment is affirmed.

Wilks v. Mouton
S.F. 24814

CONCURRING OPINION BY GRODIN, J.

In my concurring opinion in Peterson v. City of San Diego (1983) 34 Cal.3d 225, 231, I expressed concern, based upon the state constitutional mandate that "voting shall be secret," with forms of election which permit persons other than the voter to observe the ballot as it is cast. The problem inherent in such systems, I suggested, "is not simply one of purchasing votes, though a market in that commodity is far more likely if the buyer can see what he is getting. The problem includes the potential for more subtle forms of coercion. . . . [I]t is inevitable that political and special interest groups will be tempted to 'assist' voters in casting their ballots, perhaps at organizational parties at which the marking and mailing of ballots constitute a group activity." (*Id.*, at p. 232.)

This case presents a vivid illustration of the problem I described. In a local election, with a small and almost equally divided electorate, a number of ballots three times greater than the margin of ballots counted were cast by absentee voters in the presence of or with the assistance of campaign partisans, one of whom was actually a candidate, and under circumstances bound to give rise to the suspicion if not the actuality of coercion.

The state Constitution contemplates that absentee voting will occur, and that the Legislature will have broad power over its regulation (see Peterson v. City of San Diego, supra, 34 Cal.3 at pp. 228-229). Certainly we could not properly say that the constitutional demand for secrecy in voting is violated every time an absentee voter obtains physical assistance in filling out his ballot; some voters require such assistance in order to be able to vote. The trial court found that was in fact the situation in the case of voters who were assisted in this case, and I agree with the majority that there was sufficient evidence to support those findings. For these reasons I concur. I strongly suggest, however, that there is a need in this arena for prophylactic rules which the Legislature is in the best position to provide.

GRODIN, J.

Gertrude Wilks et al.
v.
Barbara A. Mouton et al.
S.F. 24814

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TRIAL COURT: San Mateo County Superior Court
TRIAL JUDGE: Hon. John F. Cruikshank
TRIAL COURT NO.: C-275654

In the Court of Appeal of the
State of California
First Appellate District
Division One

AO 24878
(S. Ct. No. C-275654)

Gertrude Wilks, et al.,
Plaintiffs and Appellants,

v.

Barbara Mouton, et al.,
Defendants and Respondents.

[Filed Aug 29 1984]

On June 7, 1983, an election was held on the question whether the unincorporated area known as East Palo Alto should become an incorporated city.[1]

On June 14, 1983, the Board of Supervisors of respondent county officially declared that the incorporation measure (Proposition A) was adopted by a vote of 1,782 in favor and 1,767 in opposition, a plurality of 15 votes. Two hundred seventy-two votes of the official tally were cast by absentee ballots which favored the incorporation measure by a ratio of nearly two to one. Appellant Wilks and respondents Mouton, Abrica, Satterwhite and Blakey received the highest number of votes and were declared duly elected to the newly created five-member city council. [The two unsuccessful candidates received 1,302 votes each, a result 159 votes less than the lowest successful candidate.] That same day appellants Wilks and Cenedella filed statements of contest chal-

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[1] This was the second election in the low-income area lying at the southerly tip of respondent county inhabited by approximately 18,000 predominantly minority residents. An earlier election, though reflecting a popular vote favoring incorporation, failed to obtain concomitant approval of the dissolution of a sanitary district by a margin of 21 votes. (See *Horwath v. Local Agency Formation Com.* (1983) 143 Cal.App.3d 177, 180.)

lenging the election results on the grounds of election officials' malconduct and illegal voting. (Elec. Code, § 20021.)[2]

On July 1, 1983, the City of East Palo Alto began operations as an incorporated city governed by the newly elected city council. Thereafter, following the filing of other statements of contest, appellants submitted a list of 324 challenged voters, ultimately reduced to 191 at trial. Respondent county submitted its own list challenging three voters.

The testimony of over 100 witnesses and some 200 marked exhibits were considered during the hotly contested three-week court trial. Following submission, the trial court adopted extensive findings of fact and conclusions of law in support of its judgment confirming passage of the incorporation measure by a margin of 13 votes[3] and the election of the four challenged respondent city council members.

On appeal, appellants assert that at least 94 of the absentee ballots cast with the assistance of EPACCI members were illegal and void due to voter fraud and malconduct of election officials.[4] The illegality is claimed to consist of the loss of secrecy during balloting, improper procedures used in obtaining and returning the ballots, and the alleged non-residency of certain voters. Appellants' principal contentions center upon the pre-election

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[2] Unless otherwise indicated, all statutory references are to the Election Code.

[3] The 15 vote margin as originally canvassed was reduced to 13 by reason of the invalidation of 8 ballots: three favoring incorporation and five opposed, as stipulated. Notably, one of the ballots found invalid was cast by appellant Breckenridge.

[4] As respondents correctly point out, no appeal lies with reference to 17 of the challenged ballots. The challenges to the following 15 voters were abandoned below: Nathaniel Bland, Henry Crum, Izola Crum, John Crum, Azer Davis, *James Fields*, Gloria Franklin, Ronald Franklin, Callie Haynes, Catherine Haynes, Sam Haynes, *Mary Hall*, *James Howard*, Willie D. Nichols and Juanita Todd. Additionally, challenges to the ballots of Joseph Minter and Aron Strong were sustained and deducted from the tally favoring incorporation; since no cross-appeal was taken from that decision, that issue is moot.

activities of Mrs. Carmeleit Oakes, Joseph Goodwill, Brad Davis and respondents Satterwhite and Blakey, leaders of the East Palo Alto Citizens Committee on Incorporation (EPACCI), a local group of citizens favoring incorporation and a slate of four candidates.

We discuss the several contentions and related findings in light of established principles on review.

Preliminarily, we briefly discuss the general rules governing an election contest involving findings supporting the challenged election. "It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal. (*People v. Prewett,* 124 Cal. 7, [56 Pac. 610]; *State v. Board of Supervisors,* 35 N. J. L. 269, 277.) Accordingly, a distinction has been developed between mandatory and directory provisions in election laws; a violation of a mandatory provision vitiates the election, whereas a departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the result of the election has been changed or the rights of the voters injuriously affected by the deviation. (*Russell v. McDowell,* 83 Cal. 70, [23 Pac. 183]; *Tebbe v. Smith,* 108 Cal. 101, [49 Am. St. Rep. 68, 29 L.R.A. 673, 41 Pac. 454].)" (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430; accord *Scott v. Kenyon* (1940) 16 Cal.2d 197, 202.) "Courts are reluctant to defeat the fair expression of popular will in elections and will not do so unless required by the plain mandate of the law." (*Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271, 277, appeal dism., 346 U.S. 802.) An election will be set aside only where the voting irregularities complained of have actually prevented a full and fair expression of the popular will. (See, e.g., *Canales v. City of Alviso* (1970) 3 Cal.3d 118 [non-resident voters]; *Garrison v. Rourke* (1948) 32 Cal.2d 430 [same] overruled on another point in *Keane v. Smith* (1971) 4 Cal.3d 932; *Scott v. Kenyon, supra,* 16 Cal.2d 197 [actual tampering with absentee ballots].) But the mere possibility of harm as distinguished from actual harm will not justify voiding an otherwise fairly conducted election. (See, e.g., *Huston v. Anderson* (1904) 145 Cal. 320 [failure of clerk to administer

oath]; *Packwood v. Brownell* (1898) 121 Cal. 478 [brief delay in opening polls]; *Shinn v. Heusner* (1949) 91 Cal.App.2d 248 [candidate delivered absentee ballots and returned completed ballots to clerk].) And where the election is undertaken pursuant to the District Reorganization Act of 1965, as here (*Horwath v. Local Agency Formation Com., supra*, 143 Cal.App.3d at pp. 180-182), informalities in the conduct of such election will not invalidate the election "if fairly conducted." (§ 23558; *County of San Mateo v. Belmont County Water Dist.* (1978) 83 Cal.App.3d 485.) The burden of proof rests upon the contestants to establish the claimed illegality or malconduct by clear and convincing evidence. (*Willburn v. Wixson* (1974) 37 Cal.App.3d 730, 737; *Hawkins v. Sanguinetti* (1950) 98 CalApp.2d 278, 283.)

Finally, the findings supporting a judgment validating a contested election may not be disturbed on appeal where the entire record discloses substantial evidence supporting such factual determination, it being "*of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, and cases there collected, emphasis in original.)

We begin our analysis of the issues presented with a consideration of the issue of the propriety of the ballots—46 in number—which were hand carried to the County Clerk, not by the absentee voters themselves, but in each instance by third parties connected with the pro-incorporation campaign committee.

On its face, such conduct is violative of section 1013 of the Elections Code, which in relevant part provides that, "after marking the ballot, the absent voter may return it to the official from whom it came by mail or in person."

The trial court, in its conclusions of law, declined to apply the literal terms of the statute, for several reasons. First, it found that the clerk had no duty to police the hand delivery of the ballots, and committed no misconduct in failing to do so. It further found that in the absence of actual fraud or tampering, contravention of the terms of the statute was, in effect, harmless; and it concluded that to invalidate a vote otherwise freely arrived at because it was

not hand delivered by the voter as required by section 1013—being violative of equal protection of laws—unconstitutionally deprived the voter of the right to vote.

Section 1013 has been interpreted as permitting an absentee voter to mail personally *or* to cause to be mailed his absentee ballot. In *Beatie v. Davila* (1982) 132 Cal.App.3d 424, while approving the statutory requirement of personal hand delivery, the court found that a third party *mailing* was justified. The court reasoned as follows:

> (2a) We construe section 1013 to permit the absent voter to utilize a third party to mail his marked ballot to the elections official. The second clause of the first sentence of section 1013 expressly authorizes alternative methods of returning the ballot to the elections official, i.e., either (1) by mail, *or* (2) in person. Engrafting the words "in person" onto the first alternative ignores the disjunctive word "or" and imposes on the phrase "by mail" a meaning not indicated by the explicit language of the statute.
>
> One may logically ask: Why would the Legislature require the voter to deliver his absentee ballot personnly to the elections official and yet allow him to utilize a third party for mailing it to the official? We think the answer to the question is clear. The Legislature recognized the impossibility of policing the act of mailing by the absentee voter, i.e., the elections official would be unable to determine who in fact mailed the ballot—the voter or someone else. Recognizing the realities of absentee voting—the voters often entrust their ballots to family members or frineds for mailing if it is convenient for them to do so—the Legislature realistically refused to impose a requirement that the absentee voter personally go to the mailbox.

(132 Cal.App.3d 424, 429.)

More recently, however, the personal delivery section of the statute was directly challenged, and the procedure at issue here squarely rejected.

In *Fair v. Hernandez* (1982) 138 Cal.App.3d 578, eleven absentee ballots were delivered to the county clerk by campaign workers rather than by the absentee voters themselves. And while no actual fraud was shown, the invalidation of the tainted ballots and consequent reversal of the election result was justified in the following terms: "Reason and authority both support the judgment of the trial court that delivery by a third party to the city clerk was improper under the statute. The rule requiring personal delivery clearly serves the paramount purpose of preserving the secrecy, uniformity, and integrity of the voting process." (*Id.*, at p. 583.)

The trial court here declined to follow *Fair v. Hernandez, supra,* apparently principally because it found no fraud or tampering with respect to the 46 challenged votes at issue. Impliedly, the court read *Fair v. Hernandez* as involving actual fraud, but we are able to discern no such conduct in that case, and find it precisely factually analogous to the case at bench.

We are also unable to agree with the trial court that initial approval by the county clerk of the third party method of delivery somehow validated an otherwise ostensibly invalid procedure. As appellants contend, the clerk's sanction[5] adds nothing to the debated propriety of the method of delivery employed since local preference and procedures can hardly supercede state election laws. As said in the earlier *Fair v. Hernandez* ((1981) 116 Cal.App.3d 868, 880, cert. den. 454 U. S. 941) decision, where the improper procedure was not merely permitted, but actually mandated: "[n]either the registrar nor the court has authority to change the law. It is most unfortunate that the voter is deprived of her franchise through the fault of an official, but no exception exists to cover the circumstance." (116 Cal.App.3d 868, 878, cert. den. 454 U. S. 941.)

As previously noted, one explanation of the logical basis for the disparate treatment of third party mailing and third party delivery is given in *Beatie v. Davila, supra,* 132 Cal.App.3d 424, 429.)

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[5] Later reconsidered and revoked. After May 24th the clerk declined to accept 32 absentee votes hand delivered by third parties.

Irrespective of the correctness of that distinction, however, we consider ourselves bound by the plain terms of section 1013 insofar as they prohibit a third party's manual delivery of absentee ballots to the county clerk. Accordingly, for all of the reasons discussed, we conclude that the 46 ballots so delivered[6] are tainted and cannot be counted in computing the results of the election.

Appellants also sought in the trial court to invalidate some 45 absentee ballots, on the basis that voting in the presence of third parties, who in some cases actually punched the ballot card for the voter, violated the mandate of Article II, section 7 of the California Constitution that "voting shall be secret." (See also Elec. Code, § 29645.)[7]

While much of the testimony presented during the lengthy and at times volatile trial was sharply conflicting, the undisputed evidence reveals that an aggressive campaign was conducted by EPACCI in support of the incorporation measure. EPACCI leaders not only provided voters with absentee ballot application forms, but also actively assisted many voters—some of whom were admittedly elderly, physically disabled, illiterate or unfamiliar with ballot forms and accompanying instructions—during the actual voting process. In some instances, the EPACCI campaign worker actually punched the ballot card for the voter.

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[6] Nothing in our Supreme Court's recent decision in *Peterson v. City of San Diego* (1983) 34 Cal.3d 225, cited by respondent, persuades us that *Fair v. Hernandez, supra,* 138 Cal.App.3d 578, was erroneously decided. Indeed, the court in *Peterson* cites the procedures outlined in section 1013 with apparent approval. (See *Peterson v. City of San Diego, supra,* 34 Cal.3d 225, at 228.)

[7] Elections Code section 26945 provides:

> Any person who, before or during an election, tampers with any voting machine, interferes or attempts to interfere with the correct operation of a voting machine or the secrecy of voting, or willfully injures a voting machine to prevent its use, and any unauthorized person who makes or has in his possession a key to a voting machine that has been adopted and will be used in elections in this state, is guilty of a felony, punishable by imprisonment in a state prison for two, three, or four years.

In light of the serious challenge to a cherished right inherent in our national political heritage, we must carefully scrutinize the claimed improprieties, as our high court recently noted in *Peterson v. City of San Diego, supra,* 34 Cal.3d 225, 229-230:

> The right to vote is, of course, fundamental (e.g., *Thompson v. Mellon* (1973) 9 Cal.3d 96, 99 [107 Cal.Rptr. 20, 507 P.2d 628]; *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721 [94 Cal.Rptr. 602, 484 P.2d 578]), and restrictions on exercise of the franchise will be strictly scrutinized and invalidated unless promotive of a compelling governmental interest (*Dunn v. Blumstein* (1972) 405 U.S. 330, 337 [31 L.Ed.2d 274, 281, 92 S.Ct. 995]; *Young v. Gnoss* (1972) 7 Cal.3d 18, 22 [101 Cal.Rptr. 533, 496 P.2d 445]). As pointed out in *Otsuke v. Hite* (1966) 64 Cal.2d 596 [51 Cal.Rptr. 284, 414 P.2d 412], the United States Supreme Court " 'has stressed on numerous occasions "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims,* 377 U.S. 533, 555 [84 S.Ct. 1362, 1378, 12 L.Ed.2d 506, 523]. The right is fundamental "because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 [6 S.Ct. 1064, 1071, 30 L.Ed. 220, 226].' (*Harman v. Forssenius* (1965) 380 U.S. 528, 537 [85 S.Ct. 1177, 14 L.Ed.2d 50].) Such matters are 'close to the core of our constitutional system' (*Carrington v. Rash* (1965) *supra* 380 U.S. 89, 96 [13 L.Ed.2d 675, 680, 85 S.Ct. 775]) and 'vital to the maintenance of democratic institutions' (*id.* at p. 94, quoting from *Schneider v. New Jersey,* 308 U.S. 147, 161 [60 S.Ct. 146, 84 L.Ed. 155]).

Having these precepts in mind, we are unable to escape the conclusion that, on the facts of the present record, indisputably the secrecy of some ballots was compromised. Thus, campaign workers systematically visited the residences of voters, often after having supplied them with absentee ballots, and either personally instructed the voter in the use of the computer ballot during the voting process or actually punched the ballot card for the voter. Seventeen ballots were punched by campaign workers for

EPACCI rather than the voter; indeed, some of these voters apparently never actually either perused or even received their ballot cards, although they did sign a ballot *envelope* for an EPACCI representative. Twenty-eight ballots were cast with the assistance of and in the presence of EPACCI representatives.[8]

In our view, such active participation in the voting process by EPACCI campaign workers, one of whom was also a candidate on the ballot, constituted an unlawful intrusion upon the secret ballot guarantee. Unlike the trial court, we can find no justification in the fact that some of such voters may have requested the assistance of campaign workers: many others did not, but were nevertheless in effect forced to a decision under intimidating circumstances, in the presence of campaign officials. Nor are we inclined to validate an otherwise improper procedure because of the absence of harassment of voters, or actual tampering with the ballots. The secret ballot requirements seek to protect not only the rights of the absentee voter to privacy and personal independence (*Peterson v. City of San Diego, supra*, 34 Cal.3d 225, 231), but the integrity of the election process as well (*Scott v. Kenyon, supra*, 16 Cal.2d 197, 204; *Fair v. Hernandez, supra*, 138 Cal.App.3d 578, 582-583). As the court declared in *Fair v. Hernandez, supra*, 138 Cal.App.3d 578, at p. 582: " '[P]reservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.' "

Again, in *Scott v. Kenyon, supra*, 16 Cal.2d 197, our high court condemned the procedure employed to count absentee ballots which permitted the opening of ballot envelopes "so that election officers, canvassing boards, and even outsiders and spectators may

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[8] Page 11, footnote 8: Footnote should follow the phrase: "by campaign workers for EPACCI" (line 6 from bottom of second paragraph of text).

Page 11, footnote 8: Footnote should read as follows: "8. We include within this category the ballots punched by Joseph Goodwill, who while not technically a campaign worker for EPACCI, was aligned with that group."

Page 11, (formerly) footnote 8: Change to footnote 9.

see how the individual voted. . . ." (*Id.*, at pp. 203-204.) While, as here, no actual tampering occurred in that case, an opportunity for tampering was *presented* and this was considered sufficient to taint the process. (*Id.*, at p. 199.) Observing that the secret ballot provisions "are designed to carefully protect the absent voter in his right to a secret ballot, which is the very foundation of our election system" (*id.*, at p. 201), the court concluded:

> If the absent voters' law is to achieve its purpose it is of the utmost importance that its terms be substantially complied with. In the long run this is important to all voters, including any who might lose their votes in a particular case. With respect to the votes of absentee voters, it is not only important to be able to tell how they actually voted, but it is of equal importance that the provisions of law be so carried out that it cannot be told how a particular individual voted. The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained.

(*Id.*, at p. 203.) The court then proceeded to hold that the absentee ballots "Should not be counted for anyone" despite the lack of proof that votes had been changed. (*Id.*, at p. 204.)

Likewise, in *Fair v. Hernandez, supra,* 138 Cal.App.3d 578, 11 votes were discounted upon proof that ballots had been unlawfully hand-delivered by a campaign worker, and the court specifically noted: "[T]he integrity and secrecy of the process are such important interests that ballots may be voided even though it is not shown that the ballots were actually tampered with. (See *Garrison v. Rourke, supra,* 32 Cal.2d 430, 443 [196 P.2d 884], overruled on another point in *Keane v. Smith, supra,* 4 Cal.3d 932, 939 [95 Cal.Rptr. 197, 485 P.2d 261].)" (*Id.*, at p. 583.)

We also reject respondent's contention that the procedure used by EPACCI campaign workers is justified because of the disability and unsophistication of some of the absentee voters. Indeed, it seems to us arguable that voters lacking in educational or political expertise are most in need of the protection afforded by the secret ballot system in order to guard against undue influence or other abuses. Disabled voters obviously often require assistance in

voting, and at times such assistance will necessarily appear to and may actually compromise the secret ballot process; assistance to such persons must be limited as much as practicable to those mechanical operations which the voter is unable to peform, and the assisting party has an obligation to faithfully carry out the voter's direction when casting the ballot. (See 56 Ops.Cal.Atty.Gen. 173, 175-176 (1958).) Moreover, statutory procedures for aid to disabled voters (Elec. Code, §§ 14234 et seq.) will be rigidly enforced. (*Patterson v. Hanley* (1902) 136 Cal. 265, 275-276.)

In the case at bench, however, while it appears that some "assisted" voters were disabled, many others were not, but nevertheless received heavy-handed and we think improperly suggestive if not outrightly coercive assistance,[9] all in derogation of constitutional guarantees of secrecy and privacy in voting.

The area of our deep concern with the present process was articulated by Justice Grodin in his concurrence in *Peterson v. City of San Diego, supra,* 34 Cal.3d 225, 232: we consider it equally apposite here: "The problem is not simply one of purchasing votes, though a market in that commodity is far more likely if the buyer can see what he is getting. The problem includes the potential for more subtle forms of coercion. To the extent that important elections are conducted by means which permit persons other than the voter to observe the ballot as it is cast, it is inevitable that political and special interest groups will be tempted to 'assist' voters in casting their ballots . . . . "

Since we have concluded that the "assistance" provided by EPACCI campaign workers, which in some case virtually—and in rarer instances actually—resulted in voting by proxy, in its totality constituted a serious breach of the constitutional right to secrecy of voting, we reluctantly decide that all ballots in which

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[9] Considering the silence of the record as to whether the statutory procedures for assistance to disabled voters were followed for the ballots here at issue, the fact that some absentee voters may have been disabled does not vitiate the secrecy violations. We also opine that such procedures must be followed for disabled *absentee* voters, just as for any other disabled voters.

EPACCI campaign workers participated in the voting process either by actually punching the ballot form or, in the voter's presence, assisting a voter in doing so, must be voided (*Scott v. Kenyon, supra,* 16 Cal.2d 197, 204). Our perusal of the record discloses that such ballots are 45 in number, but, as shall hereinafter appear, we leave to the trial court the task of identifying such ballots.

Appellants also challenge 15 ballots, mailed to Mr. Goodwill and delivered *by him* to the voters, on the grounds of noncompliance with the statutory requirement that the ballot be delivered by the election official *to the voter* by mail (c.f. § 1007, emphasis added).

While the wisdom of such a law—which appears to have its origins in the legislative concern over the principle of secrecy in elections—may be arguable, its provisions are not.

As said by the Attorney General (62 Ops. Cal.Atty. Gen. 439 (1979), "the words of section 1007 are clear.

> The Legislature has specified the elections official *shall* deliver the ballot to the voter personally or shall deliver it by mail to the voter. The language of section 1007 does not evidence any intent to include delivery of the ballot to the voter by any other method than those specified. It is significant to compare the language of section 1007 with that of section 1017. Had the Legislature intended to include delivery by a voter's authorized representative in section 1007, it is reasonable to conclude it would have expressly included such a provision. (*Cf. Sater v. Superior Court* (1975) 15 Cal.3d 230, 237-238; *Estate of Tkachuk* (1977) 73 Cal.App.3d 14, 18.)

While we find all of such 15 ballots to be tainted and illegally cast, we particularly emphasize that there is no warrant whatever in law for permitting such a practice where—as in some instances on the present record—the request for mailing to an address different from the voter's address was initiated, not by the voter, but by EPACCI officials.

We arrive at our conclusion fully recognizing that, as found by the trial court, these 15 ballots *reached* the intended voters. Nevertheless, a procedure whereby a campaign worker designates *himself* the initial recipient of the ballot, thus also appointing *himself* as the person who will deliver it to the voter, is in our view fraught with unacceptable possibilities for abuse, as well as being literally violative of the statutes and decisional law. (Elections Code, § 1007; *Scott v. Kenyon, supra,* 16 Cal.2d 197, 201; Cal. Const., art II, § 7.)

Reluctant though we are to nullify the decision of any voter, we have concluded that the integrity of the electoral process has been so severely compromised in the present circumstances as to require a declaration that certain of the challenged absentee ballots are void. (*Scott v. Kenyon, supra,* 16 Cal.2d 197, 204; *Fair v. Hernandez* (1981) 116 Cal.App.3d 868, 880.)

We turn briefly to respondent county's essentially protective cross-appeal contesting the invalidation of ballots cast by Frenchia Gibsen and Robert Long by reason of their removal beyond the geographical limits of the proposed city within 38 days of the election. We conclude that the removal of the two voters from their registered residences did not deprive them of their entitlement to vote in the former precinct (see Elec. Code, § 217), and that the trial court upon remand shall count these two votes in computing the election result.

Finally, for the benefit of the trial court upon remand, we recapitulate the categories of such tainted ballots:

(a) All those ballots—46 in number—hand delivered by third parties to the County Clerk in violation of Elections Code section 1013;

(b) All ballots cast by or with the assistance and in the presence of EPACCI campaign workers;

(c) The 15 ballots mailed to Joseph Goodwill and delivered by him to voters in contravention of the terms of Elections Code section 1007.[10]

While all of such ballots must be invalidated, we are unable to discern with certainty from the record whether such tainted ballots were cast for or against incorporation, and we note that some ballots are tainted by more than one violation of our election laws. We thus reverse the judgment of the trial court (*Canales v. City of Alviso, supra,* 3 Cal.3d 118, 128) and remand the case to the trial court for the purpose of identifying and determining which ballots shall be voided, followed by a declaration of the results of the election discounting such ballots, all in accordance with the views expressed herein.

Page 18, line 4; after "workers" add "less those ballots as to which appellant's abandoned their challenge at trial;"[11]

CERTIFIED FOR PUBLICATION.

Newsom, J.

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[10] We find no merit in appellant's remaining challenges, centering upon non-residency and different addresses on the ballot envelope.

[11] Page 18, footnote 11 (new): Text is: "We count among this number the ballots of James Fields, Mary Hall, James Howard and Willie Nichols. We also note that the ballots of Joseph Minter and Aron Strong, while void on the ground that they were not voted in secret, were invalid on other grounds and thus cannot also be discounted in this category."

I fully concur in the reasoning and conclusion of the lead opinion. That opinion appropriately recognizes that certain absentee ballots in the present case should be voided even in the absence of proof of actual fraud or tampering, inasmuch as the record establishes that substantial opportunity for tampering was presented. Precedents such as *Scott v. Kenyon* (1940) 16 Cal.2d 197 and *Fair v. Hernandez* (1982) 138 Cal.App.3d 578 reached similar results under similar circumstances.

I view the present statutory plan for absentee voter registration and voting as so broadly written that it is permeated with opportunities for abuse. The plan presents an open and easy invitation for fraud or tampering with the vote of the individual absentee voter. It also invites any determined but unscrupulous person or small group of persons literally to swing his or their way any relatively close election, contrary to the true intent of the majority of the electorate.

And, just as none of the reported decisions interpreting Elections Code section 1013 and related provisions have found actual fraud or tampering, it is likely no court will ever make such a determination. Either may well have occurred in many challenged elections or in only a few or in none. The statutory scheme, however, is such that proof of fraud or tampering is virtually impossible to produce. The open invitation is so open that only the most clumsy manipulator is likely to stumble and fail in his effort to control the result of a close election.

Virtually everything we fault certain candidates and the campaign committee in the present case as having done without proof of actual fraud or tampering, could have been done by them (or others) in slightly different ways and without detection. Had they done so, even in a manner constituting actual fraud or tampering, appellants would have been unaware of the abuse and this case would not be before us.

Very likely worse has been done in past elections without detection or challenge. Very likely worse will be done in future elections without detection or challenge.

I consider portions of Elections Code sections 1006 and 1013 so subject to abuse as to be potentially unconstitutional as inherently

violative of the requirement that "[v]oting shall be secret." (Cal. Const., art. II, § 6.) Protection for the individual absentee voter and the election process merits a legislative review and statutory modification to harmonize better with the worthy goal of encouragement of greater voter participation. Statutory revisions should reduce the frequency of successive lawsuits leading to appellate decisions voiding absentee ballots under circumstances such as those in the present case. More importantly, such changes should reduce the potential for the commission of abusive acts which go undetected and unchallenged, leading to dishonest election results.

Holmdahl, J.

Wilks v. Mouton
A0 24878

DISSENTING OPINION

I dissent.

Following a dutiful recital of settled principles governing review of a challenged election contest, the lead opinion then, with mechanical precision, manifests an insouciant disregard of those fundamental precepts designed to uphold rather than vitiate a fairly, though imperfectly, conducted election. While expressing commendable concern for the sanctity of the cherished right of suffrage, the lead opinion, through its unbending demand for strict compliance with the technical niceties which literally permeate the absentee ballot law, then proceeds to disenfranchise the very voters that law was designed to benefit. By slavish insistence on absolute obedience to otherwise imprecise and unclear procedural requirements, it conveniently ignores long-accepted practices deeply rooted in the existing absentee ballot law. In so doing, free election is once again denied to thousands of citizens of an economically distressed and isolated area who wish only to form their own community and to have a voice in shaping their own destiny.

Why should this court, in the face of legally supported findings upholding the electoral will, nullify that popular expression under a banner of election purity? Our duty is to validate, not invalidate, a contested election whenever possible (*Rideout v. City of Los Angeles* (1921) 185 Cal. 426, 430) in the absence of manifest illegality preventing a fair expression of the popular will (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127.) In discharging that mandate, our function is limited to review, not retrial of conflicting evidence upon which the challenged judgment is based. It is of little comfort to the needy absentee voter that in order to preserve the ballot right, the help provided in exercising that right strips the ballot cast of any authenticity, a truly ironic application of the Catch 22 riddle. Thoughtful concern for the free ballot properly condemns any act of "heavy-handed" or manipulative conduct; but whether such odious events occurred was for the

trial judge to detemine and not this court. So long as substantial compliance with the election laws is demonstrated and the election otherwise fairly conducted, as shown, we should not shirk our responsibility to validate the popular expression simply because of the happenstance of some irregularities under the special circumstances which existed.

A close inspection of the record impels me to cast my vote in favor of the absentee voter. My reasons follow.

I

Appellants challenged some 45 absentee ballots because the constitutional guarantee of secrecy (Cal. Const., art. II, § 7) was compromised through the presence of a third party who actually punched the ballot card or otherwise aided the voter in punching the ballot card. This deliberate intrusion into the secrecy of the absentee ballot by East Palo Alto Citizens Committee on Incorporation (EPACCI) leaders, it is argued, constituted a wrongful interference with the secrecy of voting. (See Elec. Code, § 29645.)[1]

As the lead opinion acknowledges, much of the testimony presented during the lengthy and bitterly contested trial was sharply conflicting, revealing faulty recollections, inconsistencies, some factual misstatements and even attempts to intimidate witnesses. (The trial court determined that actual harassment by incorporation opponents, which prompted offically registered complaints, and consternation over the polarizing litigation proceedings adversely affected several of the subpoened witnesses.) The evidence indicated that EPACCI conducted an aggressive campaign in support of the incorporation measure: it provided voters with absentee ballot application forms and collected completed forms at its headquarters for delivery to the county election officials. The EPACCI leaders actively aided many voters who required assistance during the balloting process conducted in the privacy of their homes and residences: some of them were either

[1] Unless otherwise indicated, all statutory references are to the Elections Code.

elderly, physically disabled, illiterate or unfamiliar with the ballot form and instructions.[2] For the most part, the assistance given related to the use of the computer ballot card and accompanying instructions; in some instances the campaign worker actually punched the ballot card at the request and direction of the voter.

Joseph Goodwill, a respected community leader, distributed approximately 79 of the absentee ballot applications to friends and relatives followed by visits to their homes to inquire whether the ballot had been received and completed. In some cases, Mr. Goodwill assisted in completing the ballot at the request and in the presence of the voter. He delivered 30 of the completed ballots to EPACCI headquarters which were thereafter delivered to the county clerk by another member, Onyango Bashir, a deputized county clerk for purposes of registration and assistance in the conduct of the elections.

Mrs. Carmaleit Oakes, the 77-year old chairperson of EPACCI, performed similar followup visits to 5 voters. Her offer to assist in the completion of the unfamiliar ballot card was accepted by at least 4 of the voters. Mrs. Oakes, also a deputized county clerk, then delivered the completed ballots to EPACCI headquarters.

Respondent Satterwhite assisted 6 voters who resided in Runnymede Gardens, a subsidized residential facility for the elderly. At the request of its resident manager, Mr. Bradley Davis, Mr. Satterwhite met with those residents who requested help in completing the ballot forms. Mr. Satterwhite punched the ballot cards at the request of 4 of the voters who were physically unable to do so; the cards were punched in the presence of the voters and in accordance with their directions. Mr. Davis provided similar assistance at the request of 2 other disabled residents. All of the completed ballots were mailed to the county clerk by Mr. Davis.

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[2] The computerized ballot card, containing approximately 228 perforated selection markings, reflected neither the ballot measure itself nor names of the candidates. Use of the ballot card in voting on the incorporation measure and the candidates for office required the voter to compare the sample ballot card with the official ballot card in order to punch out his or her choices.

Based upon such evidence, the trial court found that the assistance provided in completing the ballots in the voters' presence was made with the voters' understanding and consent and correctly reflected the voters' decision on the incorporation measure and choice of candidates. The trial court further found that in each instance the completed ballot was placed in the ballot envelope which was thereafter signed by the voter and that no one had tampered with any of these ballots. In accordance with the detailed findings made, the trial court concluded that each of the challenged voters who obtained assistance during the balloting process voluntarily waived the constitutional right to a secret ballot.

Relying chiefly on *Scott v. Kenyon* (1940) 16 Cal.2d 197, appellants make the argument—to which the plurality submits—that the intrusion into the secrecy of the balloting process requires the ballots to be voided even in the absence of actual tampering. (Cf. *Fair v. Hernandez* (1982) 138 Cal.App.3d 578, 583 [*Fair II*].) Moreover, it is asserted, the conduct of the EPACCI leaders in visiting the voters' residences and providing assistance in casting the absentee ballots was tantamount to criminal interference. (See § 29645.) I disagree on both counts.

In *Scott, actual* misconduct occurred in the counting of the absentee ballots and *actual* tampering with the ballot box was shown, leading the court to conclude that "practically every applicable provision of the law, including every provision designed to preserve the secrecy of the ballot was broken." (*Scott v. Kenyon, supra,* 16 Cal.2d at p. 201.) In contrast, the intrusion upon the voter's secrecy consisted of the campaign workers' presence in assisting the voter at the latter's consensual request. In each case the trial court found upon substantial evidence that the voters consented to the presence of such third parties in completing the ballot, that no tampering occurred and ultimately determined that the right of secrecy was waived.[3] Under such

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[3] I reject appellants' contention that the burden of proof of waiver in an election contest rests upon the contestees. (see generally *City of Ukiah v. Fones* (1966) 64 Cal.2d 104.) The burden of producing evidence as to a particular fact, in this case, illegal voting, rested initially

circumstances it cannot be said that the campaign workers' conduct resulted in wrongful interference with the voter's exercise of his or her franchise.

Cases involving analogous factual settings have rejected a similar secrecy argument. In *Beatie v. Davila* (1982) 132 Cal.App.3d 424 [mailing of an absentee ballot by a third party], the court sustained the validity of some 300 absentee ballots mailed by campaign workers to election officials against a claim of secrecy intrusion grounded upon the statutory requirement that the absent voter return the marked ballot "by mail or in person." (§ 1013.) The court reasoned, in part, that "The problem with appellant's secrecy argument in the present case is two-fold: first, unlike *Scott v. Kenyon, supra,* 16 Cal.2d 197, there is no prroof that the secrecy of any absentee voter's ballot was intruded upon after the ballot was taken from the voter. The only time it could be said that the voter's right to secrecy was compromised was when the voter marked his ballot in the presence of the campaign representative before placing it in the identification envelope. *However, if a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate's representative, he should be permitted to do so. To hold otherwise would cast a pall on absentee voting.* We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the elections official or the polling place. Such a voluntary disclosure cannot be deemed to violate the constitutional mandate." (*Id.*, 132 Cal. App. 3d at pp. 430-431, italics added.)

In *Fair v. Hernandez* (1981) 116 Cal.App.3d 868, cert. den., 454 U.S. 941 *[Fair I]*, the court similarly upheld two ballots cast with the assistance of the voter's relative "in the privacy of their common home, and only in the presence of each other, when the voter was partially physically disabled," resolving any conflict in the evidence in favor of the trial court's findings. (*Id.*, 116 Cal.App.3d at pp. 878-879.)

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on appellants. (See Evid. Code, § 550.) But assuming, arguendo, that some showing was required on the part of respondents as contestees, ample evidence of waiver existed to support the trial court's finding.

To reach any contrary conclusion would effectively result in the arbitrary nullification of the fundamental right to vote exercised through the office of an absentee ballot. (Cf. *Shinn v. Heusner* (1949) 91 Cal.App.2d 248, 252.) The recent decision of *Peterson v. City of San Diego* (1983) 34 Cal.3d 225 [upholding a special local election conducted by mail ballot] is instructive. In sustaining the provisions permitting mail balloting as consonant with the constitutional requirement for secrecy, the court emphasized the widespread use of absentee ballots and mail ballot elections in securing active citizen participation in the maintenance of representative government. (*Id.*, at pp. 229-231.) In the context of the challenged procedure, the court declared, "We are satisfied that the secrecy provision of our Constitution was never intended to preclude reasonable measures to facilitate and increase exercise of the right to vote such as absentee and mail ballot voting" while simultaneously underscoring other statutory enactments protecting the integrity of elections and the right to a secret ballot. (*Id.*, at pp. 230-231).

Although I share the concerns expressed in the concurring opinion relating to the predictable role of special interest groups where "important elections are conducted by means which permit persons other than the voter to observe the ballot as it is cast" (*Id.*, 34 Cal.3d at p. 232, conc. opn. of Grodin, J.), the statutory scheme authorizing absentee balloting must nevertheless be "liberally construed in favor of the absent voter" (§ 1001) in order to assure the precious right of suffrage. Since the Legislature has provided no guidance concerning the absent voter's need for assistance during the balloting process within the privacy of the voter's home, I cannot conclude as a matter of law that the use of assistance in the manner shown herein should automatically nullify the voter's expression of choice.[4] Where the record demonstrates neither intimidation, coercion nor actual tampering with the voting process, *as found herein*, no justification exists to disenfranchise needy voters who requested and received assistance in casting their ballots. Although I confess to a similar

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[4] Compare sections 14234 through 14236 providing for assistance of the disabled voter at the polling place.

degree of uneasiness due to the potential for mischief (see *Beatie v. Davila, supra,* 132 Cal.App.3d 424 at p. 433), especially where the assistance is provided by a *candidate* for elective office, the mere possibility of wrongdoing in connection with the consensual intrusion into the secrecy of absentee voting—without more—cannot suffice to void either the ballot or the election. (*Id.,* 132 Cal.App.3d 424 at p. 432; *Shinn v. Heusner, supra,* 91 Cal.App.2d 248, 252.)

To repeat, in recognition of the primacy of the right to vote in a free society, it is our duty to validate the election, if possible, in the absence of manifest illegality. (*Scott v. Kenyon, supra,* 16 Cal.2d at p. 202; *Rideout v. City of Los Angeles, supra,* 185 Cal. at p. 430.) Since the findings made upholding the challenged ballots and election are supported by substantial though conflicting evidence, they may not be disturbed on appeal. (*Keane v. Smith* (1971) 4 Cal.3d 932, 939; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870.)

II

Appellants' challenge to 15 ballots mailed to Mr. Goodwill and delivered by him to the voters (on the grounds of noncompliance with section 1007) fails to withstand a fair analysis of the relevant statutes as applied by the election officials.

The absentee ballot available to any registered voter (§ 1003) is initiated by a written application "signed by the applicant [showing] his place of residence" (§ 1002). Under section 1006 the printed application must contain spaces for prescribed information including, inter alia, "(a) The printed name and residence address of the voter as it appears on the affidavit of registration. [¶] (b) The address to which the ballot is to be mailed. [and] [¶] (c) The voter's signature." Upon timely receipt of the signed application, "the elections official should determine if the signature and residence address on the ballot application appear to be the same as that on the original affidavit of registration. The official may make this signature check upon receiving the voted ballot, but the signature must be compared before the absent voter ballot is canvassed. . . ." (§ 1007, subd. (a).) The statute

further provides that in determining the similarity between the signature and residence address shown on the application with that on the original affidavit of registration, the official "may use the duplicate file of affidavits . . . or the facsimiles of voter's signatures" consistent with legal requirements. (§ 1007, final unnumbered paragraph.)[5]

The interrelated statutory provisions distinguishing a voter's residence and mailing addresses evidence a legislative intention that the voter is free to elect to receive the ballot materials at an address *other than* his actual residence. The practice followed by the election officials in mailing the applications to Mr. Goodwill is not prohibited by the statutory mandate that the ballot be delivered by the official "by mail or in person." (§ 1007.) Indeed, the practice of soliciting absentee ballots is of such long standing (in this state and elsewhere) as to be a matter of judicial notice. As noted by the *Beatie* court (quoting Bolinger, Cal. Election Law During the Sixties and Seventies: Liberalization and Centralization, 28C West's Ann. Elec. Code (1977 ed.) pp. 121-122): " 'This practice began at least as early as 1958 with mass mailings containing absentee ballot applications (or requests for applications) being sent by candidates to voters of their party. Sometimes the campaign would arrange to have absentee ballot applications mailed to the campaign headquarters rather than directly to the election officials in order to obtain information on who would be voting by absentee ballot. This could result in serious delays in transmitting the applications to the election officials. In addition, there were charges that some campaign-generated applications were deliberately not delivered to the election officials in the case of voters who were apparently supporting the political opposition. [¶] 'The Legislature did little to regulate these practices.' " (*Beatie v. Davila, supra,* 132 Cal.App.3d at pp. 432-433.)

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[5] Section 1015 provides a similar method for comparing the voter's *signature* on the returned absentee ballot envelope before deposit into the ballot box utilizing either the original or duplicate affidavit of registration, a facsimile of the voter's signature or the previously compared signature on the ballot application in making the "signature check."

In the absence of remedial legislation restricting such widespread practice,[6] there is no basis in law or in logic to invalidate an otherwise authenticated completed ballot simply because of the established solicitation technique employed by the campaign worker.[7] Since the trial court expressly found that the challenged voters were entitled to receive the absentee ballots and that the ballots reached the voters to whom they were addressed, the directory *mode* of delivery in no wise affected the validity of the ballot which was cast or the election result. Those findings are adequately supported by the evidence.

III

Appellants also questioned the validity of some 46 completed ballots which were hand delivered by Mr. Goodwill, Mr. Davis and Mrs. Oakes to EPACCI campaign headquarters. The trial court found that these completed ballots were thereafter delivered by Mr. Bashir to election officials between the period May 9, 1983 through May 24, 1983, by placing said ballots in the ballot box provided by the election officials. On May 24, 1983, an election official (for the first time) informed Mr. Bashir that absentee ballots could only be delivered by the voter personally or by mail; Mr. Bashir then stamped several sealed ballot envelopes and

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[6] The June 11, 1984, issue of the respected Los Angeles Daily Journal provides a current appraisal of the popular use of absentee ballots in California elections and opposing views on needed reform. (Cox, *Absentee Ballot Popularity Sparks Calls for Reform,* Los Angeles Daily Journal (June 11, 1984) page 1, column 1.)

[7] I remain unpersuaded by the single authority upon which appellants apparently rely. (62 Ops.Atty.Gen. 439 (1979).) The legislative exemption providing for ballot delivery to "any authorized representative" (§ 1017) is peculiarly tailored to accomodate late absentee voting by hospitalized or physically handicapped voters and bears little relationship, if any, to the normal mailing process during the prescribed time. While arguably a ballot *personally* delivered by the official must be handed directly to the voter, no similar requirement exists where, as shown herein, the absentee ballot was mailed to the address provided in the ballot application and the completed ballot thereafter authenticated as required.

placed them in the United States mail, a practice he consistently followed thereafter. Appellants additionally challenge the ballot cast by Lanette Cody which had been delivered to an election official by the voter's sister.

It bears emphasis that appellants did not challenge the factual findings as made but instead attacked the related conclusions of law that no legally recognizable distinction exists between ballots mailed and those delivered by a third party in accordance with previously accepted practices of the election officials. Basing their argument on language contained in both *Fair* decisions, it is appellants' thesis—to which the plurality subscribes—that the ballots must be *delivered* to election officials only by the voter "in person" (§ 1013; *Fair v. Hernandez, supra,* 138 Cal.App.3d 578, at pp. 582-583); that in light of such statutory interpretation, the election officials acted improperly in accepting the delivered ballots. Again, I disagree.

First, it is noteworthy that the bulk of the challenged ballots were actually delivered by a deputized registrar. Although Mr. Bashir was neither expressly authorized nor instructed by election officials to physically return the completed ballots, once informed by election officials that he could no longer deliver ballots by hand, Mr. Bashir subsequently mailed other completed ballots. Lanette Cody's ballot was delivered by her sister either to the county clerk's office or the precinct board on election day.

I recognize that the mode of delivery selected can raise problems of policing in preventing possible wrongdoing as both *Fair II* and *Beatie* suggest. But the unassailable fact remains, as found by the trial court, that *none of the ballots were tampered with.* Absent proof of fraud or tampering, the mere possibility of such wrongdoing cannot vitiate either the ballot or the election. (*Beatie v. Davila, supra,* 132 Cal.App.3d at p. 432.) Moreover, the methods prescribed for returning a completed ballot appear directory in nature; thus, a departure from the literal requirements of the statute will not justify nullification of the ballot or the election where substantial compliance with the election laws is otherwise demonstrated. (*Rideout v. City of Los Angeles, supra,* 185 Cal. at p. 430; see also *San Francisco Fire Fighters v. Board of Supervisors* (1979) 96 Cal.App.3d 538, 553 and cases there

cited.)[8] Such interpretation is consistent with principles of liberal construction favoring the absent voter (§ 1001) and avoids the sensitive constitutional issues underscored by the trial court. (Cf. *Peterson v. City of San Diego, supra,* 34 Cal.3d at pp. 229-230.)

In view of such substantial compliance with the statutory requirements, the ballots were properly accepted and tallied by the election officials.

In conclusion, I would follow settled principles governing appeals in general and election contests in particular and uphold the judgment based upon findings adequately supported by substantial evidence. Appellants' burden as contestant to show by clear and convincing evidence that the election was conducted unfairly has simply not been met, as the trial court expressly determined. To rest a decision on the technical distinctions urged by appellants effectively subverts the finality of a fairly conducted election and substitutes the courtroom for the ballot box. The erosion of the fundamental right to vote and the resulting chaos in local government are too high a price to pay for intransigent adherence to the largely directory provisions of the absentee ballot law. The perceived defects in the existing absentee ballot process should be remedied by the Legislature, not by judicial fiat. Since the record before us clearly demonstrates that the election was fairly conducted in substantial compliance with the essential requirements of the absentee voters' law *as it now exists,* I would affirm the judgment validating the election.

Racanelli, P. J.

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[8] The main opinion fails to discuss the entirely different situation manifested in the substantive departure found in *Fair I* where a single ballot was voided due to the voter's identifying marks placed upon the absentee ballot at the suggestion of the election official. (*Fair v. Hernandez, supra,* 116 Cal.App.3d at p. 878.)

Trial Court:
San Mateo County Superior Court

Trial Judge:
Hon. John F. Cruikshank

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Wilks v. Mouton—A024878

In the Court of Appeal of the State of California

First Appellate District

Division One

A0 24878
(S. Ct. No. C-275654)

Gertrude Wilks, et al.,
Plaintiffs and Appellants,

v.

Barbara Mouton, et al.,
Defendants and Respondents.

Order Modifying Opinion and Denying Rehearing

THE COURT:

It is ordered that the opinion filed herein on August 29, 1984, be modified in the following particulars:

Page 11, footnote 8: footnote should follow the phrase: "by campaign workers for EPACCI" (line 6 from bottom of second paragraph of text).

Page 11, footnote 8: Should read as follows: "8. We include within this category the ballots punched by Joseph Goodwill, who while not technically a campaign worker for EPACCI, was aligned with that group."

Page 11, (formerly) footnote 8: Change to footnote 9.

Page 14: Delete footnote 9. (See below.)

Page 14: Footnote 9. should be changed to footnote 10. and should read as follows: "Considering the silence of the record as to whether the statutory procedures for assistance to disabled voters were followed for the ballots here at issue, the fact that some absentee voters may have been disabled does not vitiate the secrecy violations. We also opine that such procedures must be followed for disabled *absentee* voters, just as for any other disabled voters."

Page 18, line 4: after "workers" add "less those ballots as to which appellant's abandoned their challenge at trial;[11];"

Page 18, footnote 11 (new): Text is: "We count among this number the ballots of James Fields, Mary Hall, James Howard and Willie Nichols. We also note that the ballots of Joseph Minter and Aron Strong, while void on the ground that they were not voted in secret, were invalid on other grounds and thus cannot also be discounted in this category."

The petitions for rehearing are denied.

Racanelli, P.J., is of the opinion that the petition should be granted.

DATED: September 28, 1984

RACANELLI, P. J.
Racanelli, P.J.

Superior Court of California,
County of San Mateo

No. 275654
(Consolidated Actions)

Gertrude Wilks, et al.,
Contestants,

vs.

Barbara A. Mouton, et al.,
Defendants.

Judgement

This cause came on regularly for trial on August 2, 1983, in Department 17 of the above-entitled court, the Honorable John F. Cruikshank, Jr., Judge, presiding, sitting without a jury. Contestants appeared by Paul N. McCloskey, Jr., and Patricia Brody. Defendants City of East Palo Alto, Barbara Mouton, Ruben Abrica, Frank Omowale Satterwhite and James E. Blakey, Jr., appeared by their attorneys Thomas R. Adams and Ann Broadwell. Defendant County of San Mateo appeared by its attorney James P. Fox, District Attorney, by Thomas Daniel Daly, Assistant District Attorney. Evidence, both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision, and the court having caused to be made and filed herein its written Findings of fact and Conclusions of Law.

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Proposition A on the ballot in the June 7, 1983 election in East Palo Alto received a majority of "yes" votes and the passage of Proposition A is confirmed;

2. Barbara A. Mouton, Ruben Abrica, Frank Omowale Satterwhite and James E. Blakey, Jr., were among the five candidates receiving the highest vote totals for the office of member of the East Palo Alto City Council in the June 7, 1983 election in East Palo Alto and their election to the East Palo Alto City Council is confirmed.

3. The defendants shall have and recover from contestants their costs, in accordance with Elections Code section 20112.

Dated: October 14, 1983.

JOHN F. CRUIKSHANK, JR.
John F. Cruikshank, Jr.
Judge of the Superior Court

AFFIDAVIT OF MAILING
CASE No. 275654
Document: JUDGMENT

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City, a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

Brobeck, Phleger & Harrison
Two Palo Alto Square; Suite 230
Palo Alto, CA 94306

Thomas R. Adams, Esq.
400 So. El Camino Real, Suite 370
San Mateo, CA 94402

Thomass Daniel Daly, D.D.A.
District Attorney's Office
401 Marshall Street
Redwood City, CA 94063

Executed on 10-20-83
at Redwood City, California

MARVIN CHURCH, County Clerk
By JULIE BYWALITS
Deputy

Superior Court of California, County of San Mateo

No. 275654
(Consolidated Action)

Gertrude Wilks, et al.,
Contestants,

vs.

Barbara A. Mouton, et al.,
Defendants.

Findings of Fact and Conclusions of Law

[Filed, Oct. 20, 1983]

Prior to announcing the Court's Findings of Fact and Conclusions of Law, the Court feels that it is necessary to make some preliminary observations. These cases demonstrate the unforseen problems created by the liberalization of the absentee voter statutes.

Section 1001 of the Elections Code sets the climate in which absentee voting is to be viewed. Section 1001 of the Elections Code states:

> "This division shall be liberally construed in favor of the absent voter."

It has been said that the right to vote is not a natural right, but a political right to be regulated by the Legislature. This does not mean that voting is to be left to the whim and caprice of the Legislature, but must meet the standards implicit in the equal protection and due process provisions of the United States Constitution and the Constitution of the State of California.

In his opinion in *Peterson v. City of San Diego* (1983) 34 Cal.3d 225 Justice Broussard states the following on pages 229 and 230:

> "The right to vote, is of course, fundamental (e.g., *Thompson v. Mellon* (1973) 9 Cal.3d 96, 99 [107 Cal.Rptr. 20, 507 P.2d 628]; *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721 [94 Cal.Rptr. 602, 484 P.2d 578], and restrictions on exercise of the franchise will be strictly scrutinized and invalidated

> unless promotive of a compelling governmental interest (*Dunn v. Blumstein* (1972) 405 U.S. 330, 337 [31 L.Ed.2d 274, 281, 92 S.Ct. 995] *Young v. Gnoss* (1972) 7 Cal.3d 18, 22 [101 Cal.Rptr.533, 496 P.2d 442]). As pointed out in *Otsuka v. Hite* (1966) 64 Cal.2d 596 [51 Cal.Rptr. 284, 414 P.2d 412], the United States Supreme Court ' "has stressed on numerous occasions, 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' *Reynolds v. Sims,* 377 U.S. 533, 555 [84 S. Ct. 1362, 1378, 12 L.Ed.2d 506, 523]. . . . ' "

It is to be noted that the election in question was highly volatile, to say the least. It is in this background, the Court had to weigh and assess the evidence presented.

Also, an examination of the exhibits demonstrates that the manner in which absentee ballots are cast leaves much to be desired. The voter is presented with a 3 x 7 card with 228 numbered spaces. The voter also receives a sample ballot with the ballot measures and the names of candidates. Next to each proposition and candidate is a number to correspond with the numbers on the card. This must be confusing to most voters, particularly those who are less sophisticated.

Contestants raised many issues, many of which were found to be groundless. However, a major thrust of the contestants rested in the decision of *Fair v. Hernandez* (1982) 138 Cal.App.3d 578. In interpreting section 1013 of the Elections Code, the Court, at page 582, sets forth the following reasoning:

> "First of all, it is clearly the purpose of the statute to preserve the secrecy, uniformity, and integrity of the voting process. (See *McFarland v. Spengler* (1926) 199 Cal. 147, 152 [248 P. 52].) Requiring personal delivery of the absentee ballot by the voter avoids potential problems affecting the secrecy, uniformity and integrity of the absent voter's franchise. As Justice Kaufman pointed out when this case was last before us, '[P]reservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.' (*Fair v. Hernandez,* supra. 116

> Cal.App.3d 868, 881, conc. opn. of Kaufman, J.) This important policy is admirably served by the interpretation we have placed on the statute."

It is to be pointed out that the essence of the above rationale is the avoidance of "potential problems affecting the secrecy, uniformity and integrity of the absent voter's franchise". In weighing and assessing the evidence presented, the Court finds no fraud or collusion.

As stated in *Beatie v. Davila* (1982) 132 Cal.App.3d 424, the Court, at page 430 and 431:

> "the problem with appellant's secrecy argument in the present case is two-fold: First, unlike *Scott v. Kenyon,* supra, 16 Cal.2d 197, there is no proof that the secrecy of any absentee voter's ballot was intruded upon after the ballot was taken from the voter. The only time it could be said that the voter's right to secrecy was compromised was when the voter marked his ballot in the presence of the campaign representative before placing it in the identification envelope. However, if a voter wishes to disclose his marked ballot to someone else, be it a family member, friend or a candidate's representative, he should be permitted to do so. To hold otherwise would cast a pall on absentee voting. We suspect that many absentee voters disclose their marked ballots to other persons before placing them in the identification envelope for return to the elections official or the polling place. Such a voluntary disclosure cannot be deemed to violate the constitutional mandate."

It is also to be noted, the harassment of voters; the reluctance of voters to come forth and testify in a court of law; the lapses of memory of those who did testify, some testifying as the result of the issuance of bench warrants; and the zeal of the opponents to the corporation paint an apalling picture.

The Court is well aware that measures protecting the secrecy of the ballot are easier to apply at the polling place, rather than within the sanctity of the home. It is the Court's feeling that this task should be directed to the Legislature and is not to be legislated by the Court.

It should also be pointed out, that a number of the contestants in this matter neither retained nor knew that they were receiving legal representation. It is also of some importance, that these law suits were financed not by citizens of the community, but landowners and that the ballots in question were cast by tenants.

In that light, the words of the late Justice Mathew O. Tobriner at pages 965 and 966 of his opinion in *Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, are most appropriate:

> "The ideal of maximum participation in democratic decision-making particularly applies to participation in the affairs of the city. One of the most striking and encouraging phenomena of our times has been the deep and renewed interest of citizens in local community matters. To frustrate the endeavor of individuals to fix the unit of their local governance and to repose that power in land, not people, would be to stifle that self-determination. The seeds of democracy lay in the Greek city-state, we would be reluctant to stay the fruition of that democratic expression in the city of today. Neither the state nor federal Constitution sanctions such negation; each compels the opposite."

Consistent with the above observations, the Court makes the following findings of fact and conclusions of law.

The above-entitled cause came on regularly for trial on August 2, 1983, in Department 17 of the above-entitled Court, the Honorable John F. Cruikshank, Jr. presiding and the trial commenced on that date and continued on August 3, 4, 5, 24, 25, 26, 30, 31, and September 1, 2, 6, 7, 8 and 14, 1983. Paul N. McCloskey, Jr., and Patricia M. Brody appeared as counsel for the contestants; Thomas R. Adams and Ann Broadwell appeared as counsel for defendants City of East Palo Alto, Barbara A. Mouton, Frank Omowale Satterwhite, Ruben Abrica and James E. Blakey, Jr.; James P. Fox, District Attorney, by Thomas Daniel Daly, Assistant District Attorney, appeared for defendant County of San Mateo.

One hundred and eleven witnesses (111) testified, 207 documents were marked as exhibits, briefs were submitted and the cause was argued and submitted for decision. The Court, having

considered the evidence, and the written briefs and oral arguments of counsel, and being fully advised, the Court issues the following Findings of Fact and Conclusions of Law and Statement of Decision.

FINDINGS OF FACT

1. Pursuant to Government Code section 56440, the San Mateo County Board of Supervisors scheduled an election for June 7, 1983, in the unincorporated area of East Palo Alto. The election was to determine whether East Palo Alto should be incorporated as a city and, if so, to elect five people to the city council.

2. The East Palo Alto Citizens' Committee on Incorporation ("EPACCI") organized a campaign in support of incorporation and in support of a slate of four city council candidates. The four candidates were Barbara A. Mouton, Frank Omowale Satterwhite, Ruben Abrica and James E. Blakey, Jr.

3. As part of its campaign, EPACCI provided voters with absentee ballot application forms. Application forms were collected at EPACCI headquarters. The Chairman of EPACCI's Voter Registration Committee, Onyango Bashir, personally delivered completed applications to the County Clerk's office in Redwood City.

4. Joseph Goodwill also provided people with absentee ballot applications.

5. Upon receipt of an application for an absentee ballot, the County Clerk checked the voter's signature and determined whether the voter was entitled to receive an absentee ballot. If so, he mailed an absentee ballot, along with all of the required materials, to the mailing address indicated on the application.

6. Some voters requested that absentee ballots be mailed to an address other than their residence address. The County Clerk complied with such requests by mailing the absentee ballot and materials to the address requested. All of the challenged absentee ballots reached the voters to whom they were addressed.

7. The Clerk mailed to each absent voter all of the supplies necessary for the use and return of the ballot. The absentee ballots used in the election were in the form of computer cards with holes to be punched. The cards were approximately 3" wide x 7" long and were beige in color. They had 228 numbered spaces which could be punched out. A voter casts a vote by punching the space opposite to the number, given on a key, for the candidates and for "yes" or "no" on Proposition A. A metal pin, shaped like the bent half of a paper clip, was provided for punching out the ballot. A voted absentee ballot in this election would have six holes punched in it if the voter cast a vote on Proposition A and voted for five candidates. The candidates' names and the text of Proposition A were not printed on the computer card. They were numbered and printed on accompanying instructions.

8. Included with the absentee ballot was an instruction sheet prepared by the County Clerk (Exhibit 6E). It contains no instructions about delivering the voted ballot to the Clerk's office in Redwood City nor does it indicate that ballots can only be delivered to Redwood City by the voter personally. The instruction sheet omits any discussion of this topic.

9. Joseph Goodwill distributed approximately 79 absentee ballot applications. Mr. Goodwill distributed these applications to his family members or friends and acquaintances of long standing. When enough time had elapsed for the Clerk to have processed the application and mailed an absentee ballot to the voter, Mr. Goodwill got back in touch with the voter and asked whether the absentee ballot had been received, and whether the voter had completed and returned the absentee ballot to the County Clerk.

10. In some instances the voter asked Mr. Goodwill for instructions about the absentee ballot procedure. In some instances, because of age, physical disability or lack of familiarity with the computer card, the voter asked Mr. Goodwill for help completing the absentee ballot. In yet other instances, the voter had completed the ballot and gave it to Mr. Goodwill to return to the County Clerk. In some instances the voter had already completed and returned the absentee ballot to the County Clerk. In those instances where Mr. Goodwill helped complete the absentee ballot, he did so in privacy, in the presence of the voter,

with the voter's understanding and consent. Occasionally, one or more members of the voter's family were present, with the voter's consent. All the ballots were punched to reflect the voter's decision on the candidates and on Proposition A. After the ballot was completed, each voter signed the ballot envelope.

11. Joseph Goodwill delivered 30 voted absentee ballots from the voters to EPACCI campaign headquarters. Ten of those ballots were cast by his own relatives.

12. The 30 voted ballots collected by Mr. Goodwill, and delivered to EPACCI headquarters, were those of:

Sharon D. Anderson	Vernon Julian
Ola May Augmon	Vincent Julian
Mary A. Brown	Faye Dell Knowles
Stanley C. Brown	Warren Locksey
Christopher Cook	Eldridge Lyons
Brenda Crum	Mary Lyons
Alnette Goodwill	Joe Minter
Debra Goodwill	Robbie Lee Shepard
Don E. Goodwill	Aron Strong
Thelma M. Goodwill	Clara Strong
Sherman J. Goodwill, Jr.	Dwan A. Strong
Renita Haynes	Freddie D. Strong
Alice Julian	Kenneth Lee Strong
Denise D. Julian	Lucille D. Strong
Louise Julian	Sylvester Strong

13. All of these ballots were delivered to the County Clerk by Onyango Bashir. No one tampered with any of these ballots.

14. Forty-nine other voters gave their voted absentee ballots to Mr. Goodwill to return to the Clerk. All of those ballots were mailed by Mr. Goodwill to the Clerk's office. No one tampered with any of those ballots.

15. Mrs. Carmaleit Oakes, 77 years old, followed up five absentee ballot applications. She visited those five voters after enough time had elapsed for them to have received their absentee ballots. She was invited into their homes. She offered to help them with their absentee ballots. They all accepted her offer. All

five people discussed their votes with her and voluntarily showed their ballot materials to her. At their request, because of lack of familiarity with the computer card, she helped four voters complete their absentee ballots in the privacy of their own homes. She helped complete all four ballots with the voters' understanding and consent and in accordance with the voter's wishes. Each completed ballot correctly reflected each voter's choice of candidates and each voter's decision on Proposition A. After the ballot was completed, each voter signed the ballot envelope. The four voters were Grant White, Mary White (a.k.a. Mary Owens), Matielda Dixon and Calvin Dixon. The fifth voter who completed her own absentee ballot, was Geraldine Gadlin. Mrs. Oakes took the completed absentee ballots of these five voters to EPACCI headquarters. No one tampered with any of these ballots.

16. Several people who voted absentee live at Runnymede Gardens in East Palo Alto. Runnymede Gardens is a federally-subsidized residential facility for the elderly. Many of the residents are handicapped. Brad Davis is the resident manager of Runnymede Gardens.

17. Prior to the June 7, 1983, election, several residents of Runnymede Gardens asked Mr. Davis for help with their absentee ballots. Mr. Davis arranged a meeting at Runnymede Gardens. Any resident who wanted help could attend the meeting. Mr. Frank Omowale Satterwhite came to Runnymede Gardens for the meeting and helped six voters with their absentee ballots. All six voters requested help. All who showed their ballots to Mr. Satterwhite did so voluntarily. Four of these people asked Mr. Satterwhite to complete their absentee ballots. Because of age or disability, they could not punch out the holes in the absentee ballot computer cards themselves. These voters were: Rosa Lee Ahern, Ann Brandon, Betty Brandon and Luberta Brookter. Mr. Satterwhite carefully ascertained their wishes, punched out the ballots according to the voter's instructions and showed the punched ballot to the voter. Mr. Satterwhite's assistance was provided with the voters' understanding and consent and the voters all signed the ballot envelopes. Mr. Satterwhite gave these absentee ballots to Brad Davis, along with those of Consuelo Barrow and Maxine Barrow, who completed their own ballots.

18. In addition, several voters who lived at Runnymede Gardens gave their completed absentee ballots to Mr. Davis for delivery. All ballots received by Mr. Davis were delivered by him to EPACCI headquarters. The ballots delivered by Mr. Davis were from the following voters:

Rosa Lee Ahern
Consuelo Barrow
Maxine Barrow
Ann Brandon
Betty Brandon
Luberta Brookter
Bobbie Heard
Lila Jefferson
Leona Walton
Priscilla Washington
Eleanor Wilson

No one tampered with any of these ballots.

19. Because of physical disabilities, two residents of Runnymede Gardens, Mary Hall and James Fields, asked Mr. Davis for help filling out their ballots. Mr. Davis filled out their ballots in privacy, in the voter's presence, according to the voter's instructions and with the voter's understanding and consent. After the ballots were completed, the voters signed their ballot envelopes. Mr. Davis placed these ballot envelopes in the United States mail for delivery to the County Clerk. No one tampered with either of these ballots.

20. The contestants also challenged Rosalind Simon's absentee ballot. It was actually filled out by her mother, Mildren Simon. The ballot was completed in privacy according to Rosalind Simon's instructions and at her request. Because of recent surgery, Rosalind Simon was physically unable to complete the ballot herself.

21. The ballots delivered to EPACCI headquarters by Mrs. Oakes, Mr. Goodwill and Mr. Davis were either mailed or delivered by Onyango Bashir to the County Clerk's office in Redwood City. Mr. Bashir delivered ballots between May 9, 1983, and May 24, 1983. Mr. Bashir placed these ballots in a ballot box

which sat on the counter in the County Clerk's office, Room B, at the Hall of Justice and Records in Redwood City, California. No one tampered with any of these absentee ballots.

22. Deputy County Clerks are in charge of Room B. Between May 9, 1983 and May 24, 1983, those Deputy County Clerks allowed voted absentee ballots to be deposited in the ballot box by anyone. During that period, Onyango Bashir deposited approximately 46 ballots in the ballot box.

23. On May 24, 1983, Robert Kasper, Assistant County Clerk, came to Room B and gave the Deputy Clerk copies of a page from an Attorney General's opinion. The opinion stated that absentee ballots could be delivered only by the voter. Mr. Kasper was aware of this opinion prior to May 9, 1983, but did not bring it to the attention of the clerks in Room B because of the press of other duties related to the election. A copy of a page from the Attorney General's opinion was taped onto the ballot box. The page has been admitted into evidence as Exhibit 9.

24. On May 24, 1983, Mr. Bashir came to Room B with several absentee ballots to deliver. At that time, he was informed by the clerks that he could not place the ballots in the ballot box, but would have to mail them. He took them outside of the building, put stamps on them and put them in the mailbox.

25. After May 24, 1983, no absentee ballots were delivered to the Clerk's office by Mr. Bashir or anyone else from EPACCI. After May 24, 1983, Mr. Bashir mailed absentee ballots to the County Clerk and did not return them in person.

26. At all relevant times, Mr. Onyango Bashir was designated as a Deputy County Clerk. According to the card issued to Mr. Bashir and signed by the County Clerk-Recorder, Mr. Bashir "is designated as a Deputy County Clerk to assist in duties in the conduct of elections authorized by law" (Exhibit 55). Mr. Bashir took the same oath of office that was taken by the County Clerk.

27. Mr. Bashir was appointed a Deputy County Clerk in order to register voters. He was issued instructions on the procedures for registration of voters. He was not instructed in the handling of absentee ballots by the County Clerk and prior to May 24, 1983,

did not know of any opinion that absentee ballots must be delivered to the County Clerk by the voter.

28. Prior to the June 7, 1983 election, the County Clerk had not considered whether Deputy County Clerks appointed for registration were authorized to receive absentee ballots. When the issue arose in this trial, the County Clerk considered the issue and determined that Mr. Bashir and other Deputy County Clerks were authorized to receive absentee ballots. The County Clerk has not imposed any limitation of the authority of the Deputy County Clerks as set forth in Exhibit 55.

29. Carmaleit Oakes was also a Deputy County Clerk with the same authority and instruction as Mr. Bashir. Mr. Brad Davis, Mr. Joseph Goodwill and Mr. Frank Omowale Satterwhite were not Deputy County Clerks.

30. One voter, Lanette Cody, completed her absentee ballot and gave it to her sister for delivery to the Clerk. The evidence establishes that her ballot was either delivered to the precinct board on election day or to the County Clerk's office in Redwood City. No one tampered with that ballot.

31. Some absentee ballots received by the County Clerk gave, as a return address, an address other than the voter's residence address. The County Clerk compared the signature on absentee ballots with the signature on the affidavit of registration. If the signatures matched, the ballot was counted, even if the return address was not the residence address.

32. The election was held on June 7, 1983. On June 14, 1983, the Board of Supervisors declared the results as follows:

a. On Proposition A, the measure for incorporation, the "yes" votes totaled 1,782, and the "no" votes totaled 1,767. The incorporation measure passed by 15 votes. Of the total votes counted, 3,277 votes were cast at the polls and 272 votes were cast by absentee ballot. Of the votes cast at the precinct places, incorporation was defeated (1,599 for versus 1,678 against) by a margin of 79 votes. Of the absentee votes, the vote was 183 for incorporation versus 89 against it, a margin of 94 votes.

b. Five persons were declared elected to the City Council of East Palo Alto. Those persons are: Gertrude Wilks (1,607 votes), Barbara A. Mouton (1,553 votes), Frank Omowale Satterwhite (1,527 votes), Ruben Abrica (1,516 votes) and James E. Blakey, Jr. (1,461 votes). The candidates with the next highest vote total were tied. They are Henry E. Anthony and Pat Johnson, with 1,302 votes each.

33. On June 14, 1983, Gertrude Wilks and Arn Cenendella filed Statements of Contest pursuant to Elections Code section 20000, et seq., challenging the approval of Proposition A and the election of Barbara A. Mouton, Frank Omowale Satterwhite, Ruben Abrica and James E. Blakey, Jr.

34. On July 1, 1983, pursuant to the election results and the order of the Board of Supervisors, the City of East Palo Alto was incorporated and commenced operation.

35. On July 14, 1983, Gertrude Wilks filed an amended Statement of Contest. Statements of Contest were also filed by Grant White, Mary L. Owens, Eulesley Reece, Edward Johnson, Leon E. Abernathy, Joe T. Sanders, L. A. Breckenridge and Roy Lee Ashford.

36. On July 27, 1983, the Court signed an order requiring the joinder of the City of East Palo Alto and the County of San Mateo as party defendants.

37. On July 29, 1983, the contestants filed an "Amended List of Illegal Votes". The list contained the names of 324 voters.

38. Also on July 29, 1983, the County of San Mateo submitted a list of challenged votes. The County's list contained the names of three voters: L. A. Breckenridge, Albert Nakai and Sally Nakai.

39. On August 2, 1983, trial commenced. Also on that date, the contestants filed a "Second Amended Statement of Grounds of Contest of Election of Defendants and of the Incorporation of East Palo Alto". The Second Amended Statement reduced the list of challenged votes to a total of 312 names.

40. The Court heard the testimony of witnesses on August 2, 3, 4 and 5, 1983. On August 12, 1983, the contestants mailed a letter to the Court eliminating 121 names from the list of challenged votes. The total of challenged votes was reduced to 191.

41. Trial was recessed until August 24, 1983, when testimony resumed. Testimony continued on August 25, 26, 30 and 31, 1983, and on September 1, 2, 6, 7, 8 and 14, 1983. During the course of the trial, contestants dropped their challenges to an additional 14 voters, leaving a total of 177 votes challenged by the contestants at the conclusion of the trial.

42. Thirty-five voters were challenged by the contestants on the ground that they were not domiciled in East Palo Alto during the 29 days preceding the election. Two votes were challenged by the contestants on the ground that they had moved out of East Palo Alto in the 28 days prior to the election.

43. Frenchia Gibsen was registered in East Palo Alto, but moved out of the proposed City of East Palo Alto during the 28 days preceding the June 7, 1983 election. Mr. Gibson voted in the June 7, 1983 election in East Palo. The parties have stipulated that Mr. Gibsen voted "yes" on Proposition A.

44. Robert Long was registered in East Palo Alto, but moved out of the proposed City of East Palo Alto during the 28 days preceding the June 7, 1983 election. Mr. Long voted in the June 7, 1983 election in East Palo Alto. The parties have stipulated that Mr. Long voted "yes" on Proposition A.

45. Joe Minter was not domiciled in the precinct in which he registered during the 29 days preceding the June 7, 1983 election. Mr. Minter voted in the June 7, 1983 election in East Palo Alto. The parties have stipulated that Mr. Minter voted "yes" on Proposition A.

46. Roy Adger resided at 2330 Palo Verde, East Palo Alto, during the 29 days preceding the June 7, 1983 election. Mr. Adger voted in precinct 406007 in the June 7, 1983 election. Said address of 2330 Palo Verde, East Palo Alto, is not in precinct 406007. Mr. Adger did not have a domicile in precinct 406007; he

was domiciled in precinct 406003 during the 29 days preceding the June 7, 1983 election. The parties have stipulated that Mr. Adger voted "yes" on Proposition A.

47. Aron Strong was domiciled at 1101 Del Norte, Menlo Park, during the 29 days preceding the June 7, 1983 election. Mr. Strong did not have a domicile in East Palo Alto during the 29 days preceding the June 7, 1983 election. Mr. Strong voted in the June 7, 1983 election. The parties have stipulated that Mr. Strong voted "yes" on Proposition A.

48. The vote of L. A. Breckenridge was challenged by San Mateo County. Mr. Breckenridge was domiciled at 1090 Weeks Street, East Palo Alto, during the 29 days preceding the June 7, 1983 election. Mr. Breckenridge voted at precinct 406002 in the June 7, 1983 election. Said address of 1090 Weeks Street is not in precinct 406002. Mr. Breckenridge did not have a domicile within precinct 406002 during the 29 days preceding the June 7, 1983 election; he was domiciled in precinct 406006. The parties have stipulated that Mr. Breckenridge voted "no" on Proposition A.

49. The votes of Sally Nakai and Albert Nakai were challenged by San Mateo County. Mr. and Mrs. Nakai were domiciled at 61 Irving Street, Atherton, during the 29 days preceding the June 7, 1983 election in East Palo Alto. Neither Sally Nakai nor Albert Nakai had a domicile in East Palo Alto during the 29 days preceding the June 7, 1983 election. The parties have stipulated that Sally Nakai and Albert Nakai both voted "no" on Proposition A.

50. The evidence presented at the trial shows that all of the voters listed on Exhibit "A" (attached hereto), were domiciled in the precincts in which they were registered and in which they voted. Several of those voters (Stephanie Clemons, Ann Friauf, Shawn Patrick Ghee, Lois Middleton, Gwendolyn Parris, Freddie D. Strong, Eddie Young, Jr.) had moved from one domicile to another domicile in the same precinct in which they were registered to vote.

51. The evidence does not show that any of the voters on Exhibit "B" (attached hereto), lost their domicile in the precinct in which they were registered. Evidence was presented only that

these voters moved from their registered addresses. The evidence did not establish their intent, their residences or their domiciles during the 29 days preceding the June 7, 1983 election.

52. The Court has listened to and carefully considered the testimony of all the witnesses. The testimony was sometimes conflicting. The Court has observed the demeanor of the witnesses and evaluated their credibility. In evaluating the credibility of the witnesses, the Court has considered the fact that many of the witnesses had poor recollection of the events they testified about. The Court has also taken into account the fact that several witnesses were subjected to the pressure of repeated visits after the election by opponents of incorporation. Testimony of several witnesses was additionally affected by fear of judicial proceedings. The Court has also evaluated the fact that there were internal inconsistencies in some of the testimony and the fact that some witnesses testified to facts which were not true.

CONCLUSIONS OF LAW

1. There was no fraud as to any challenged ballot cast.

2. There was no tampering with any challenged ballot cast.

3. There was no forgery as to any challenged ballot cast.

4. All of the absentee ballots which were delivered to the County Clerk by a person other then the voter are valid because:

a. The evidence shows that there was no fraud or tampering with such ballots and, therefore, the decision in *Fair v. Hernandex*, 138 Cal.App.3d 578, 188 Cal.Rptr. 45 (1982), does not apply to the particular facts of this case; and

b. The Equal Protection of the California Constitution and the United States Constitution prohibit distinguishing between absentee ballots mailed by third parties to the County Clerk, those delivered by third parties to the precinct board and those delivered by third parties to the County Clerk absent a compelling state interest. There is no compelling state interest in making such a distinction. The Due Process Clauses of the United States Constitution and of the California Constitution prohibit a post hoc deprivation of the franchise when qualified electors cast their

votes in accordance with procedures established by those authorized to conduct elections. The votes here were cast in accordance with the procedures established by the County Clerk, who is authorized to conduct elections.

5. The constitutional rights to a secret ballot and to privacy were not violated because the evidence shows that all of the voters who showed their ballots to third parties or who obtained assistance from third parties did so voluntarily and waived such rights.

6. Six voters cast illegal votes because they were not domiciled in East Palo Alto within the meaning of the Elections Code. They are: Roy Adger, L. A. Breckenridge, Joe Minter, Albert Nakai, Sally Nakai and Aron Strong.

7. Two voters, Frenchia Gibsen and Robert Long, moved from their registered addresses within 28 days of the June 7, 1983 election, but they were not entitled to vote in that election because they moved outside of the city limits of the proposed City of East Palo Alto.

8. Aside from the eight voters named in paragraphs 58 and 59, none of the other voters challenged on the ground of residence cast illegal votes because:

a. The evidence shows that the voters on Exhibit "A" attached hereto were domiciled within the precincts in which they were registered on election day;

b. There is no clear and convincing evidence that any of the voters on Exhibit "B" cast illegal votes.

9. There is no clear and convincing evidence that any voter, other than the eight voters listed in paragraphs 58 and 59, cast an illegal vote in the June 7, 1983 election.

10. No precinct board or elected official committed any malconduct in the June 7, 1983 election within the meaning of Elections Code section 20021(a) or section 20023.

11. No precinct board or election official, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been

declared elected or as to the ballot measure (Proposition A) which was passed.

12. Elections Code section 1006 authorized the County Clerk to mail an absentee ballot to an address other than the residence address of the voter. Therefore, the 16 ballots listed on Exhibit "C" are legal.

13. Elections Code section 1015 only requires the Clerk to compare the signature on the identification envelope with the signature on the affidavit of registration, and does not require that the residence addresses be compared. Therefore, the 16 ballots listed in Exhibit "D" are legal.

14. There is no evidence that any challenged ballot was cast by a non-citizen. There is no evidence that Antonio Sanchez is not a citizen.

15. Pursuant to Elections Code section 20086, the Court affirms the passage of Propostion A in the June 7, 1983 special election in East Palo Alto by a margin of 13 votes, 1,777 to 1,764.

16. The evidence does not establish that a person who was not declared elected to the City Council actually received a higher number of votes than Barbara A. Mouton, Frank Omowale Satterwhite, Ruben Abrica or James E. Blakey, Jr. Pursuant to Elections Code section 20086, the Court thus confirms the election to the City Council of Barbara A. Mouton, Frank Omowale Satterwhite, Ruben Abrica and James A. Blakey, Jr.

Dated: October 14, 1983.

JOHN F. CRUIKSHANK, JR.
John F. Cruikshank, Jr.
Judge of the Superior Court

Exhibit "A"

1. Lowell J. Bennett, Jr.
2. Virgil Isaasc Boyd, Jr.
3. Stephanie Clemons
4. Roosevelt Cox, Jr.
5. Waheedah Dawan
6. Ann Friauf
7. Shawn Patrick Ghee
8. Warren Locksey
9. Lois Middleton
10. Schery Ruth Mitchell
11. Gwendolyn Parris
12. Carlos A. Romero
13. Kaye Smith
14. Freddie D. Strong
15. Eddie Young, Jr.

Exhibit "B"

1. Marion E. Anderson
2. Denise D. Dawson
3. Judith Drew
4. Lisa Dupee
5. Gloria Y. Forbes
6. Violet Forbes
7. Spurgeon Gardner
8. Ricardo Lara
9. Eldridge Lyons
10. Archie Marshall
11. Jacqueline McKenzie
12. Ronnie McKenzie
13. Wanda Robinson
14. Shawn S. Smith
15. Kenneth Stowe
16. Johnnie L. Taylor
17. Daniel L. Zachary

Exhibit "C"

1. Roy Lee Ashford
2. Leona Brown
3. Chester Fontenot
4. Anitra C. Gilbert
5. Michael Harmon
6. William R. Julian
7. Lonnie McGee
8. Joe Minter
9. Alberta Mitchell
10. Mildred M. Simon
11. Rosalind M. Simon
12. Earnest Smith
13. Ronnie Smith
14. Sullen Smith
15. Melody M. Whitefield
16. Bennie Williams

Exhibit "D"

1. Roy Lee Ashford
2. Leona Brown
3. Chester Fontenot
4. Alnette Goodwill
5. William R. Julian
6. Lonnie McGee
7. Alberta Mitchell
8. Mildred M. Simon
9. Rosalind M. Simon
10. Bernice Smith
11. Earnest Smith
12. Ronnie Smith
13. Sullen Smith
14. Otelia Thomas
15. Melody M. Whitefield
16. Bennie Williams

AFFIDAVIT OF MAILING

CASE NO. 275654

DOCUMENT: FINDINGS OF FACT AND CONCLUSIONS OF LAW

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

Brobeck, Phleger & Harrison
Two Palo Alto Square, Suite 230
Palo Alto, CA 94306

Thomas R. Adams, Esq.
400 So. El Camino Real, Suite 370
San Mateo, CA 94402

Thomas Daniel Daly, D.D.A.
District Attorney's Office
401 Marshall Street
Redwood City, DA 94063

Executed on 10-20-83
at Redwood City, California

Marvin Church, County Clerk

By JULIE BYWATERS
Deputy

Paul N. McCloskey, Jr.
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Attorneys for Contestant

Superior Court of the State of California

No. 275 654
Gertrude Wilks,
Contestant,

vs.

Barbara A. Mouton; Frank Omowale Satterwhite;
James E. Blakely, Jr.; and Ruben Abrica,
Defendants.

Contestant's Preliminary Pretrial Memorandum
of Points and Authorities

This memorandum is intended to be of assistance to Court and counsel in framing a preliminary order for procedures prior to and at trial, and to lay out the legal basis for the various contests herein. It is not intended as a definitive and comprehensive statement of all law applicable to the factual issues which are still being developed by investigation as of the date of this memorandum.

I. GENERAL PROVISIONS OF LAW

Sections 20001, *et seq.*, of the Elections Code provide the procedure and basis for a contest of any election by any elector of a county or any political subdivision thereof.

Section 20021 specifies the only grounds for contest and is set forth in full as follows:

§ 20021. *Grounds for contest*

Any elector of a county, city, or of any political subdivision of either may contest any election held therein, for any of the following causes:

(a) That the precinct board or any member thereof was guilty of malconduct.

(b) That the person who has been declared elected to an office was not, at the time of the election, eligible to that office.

(c) That the defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in Division 17 (commencing with Section 29100).

(d) That illegal votes were cast.

(e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected.

(f) That there was an error in the vote-counting programs or summation of ballot counts.

Contest proceedings are not of an ordinary adversary character, but involve the right of the people to have the fact as to who has been duly elected by them judicially determined. *Norwood v. Kenfield,* 30 Cal. 393 (1866); *Coglan v. Beard,* 67 Cal. 303 (1885); *Sweeny v. Adams,* 141 Cal. 558 (1904); *O'Dowd v. Superior Court of San Francisco,* 158 Cal. 537 (1910).

The issue is one of a voter's constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted, *Hadley v. Junior College Dist.,* 397 U.S. 50, 52 (1970).

The inquiry must be as to whether in a given instance the popular will has been, or is about to be, thwarted by mistake or fraud, and the public interest requires that the ultimate determination of the contest be the right result. *Minor v. Kidder,* 43 Cal. 229 (1872); *Preston v. Culbertson,* 58 Cal. 198 (1881); *Lord v. Dunster,* 79 Cal. 477 (1889); *Sweeny v. Adams, supra.*

An election contest and the constitutional right involved applies to a ballot proposition, such as a consolidation election, as well as to the election of individuals. *Canales v. City of Alviso,* 3 Cal.3d at 129-131.

Where there is no evidence as to how illegal votes were cast, the Court has the power to apportion them in the same manner as the legal votes cast. *Russell v. McDowell,* 83 Cal. 70 (1890); *Singletary v. Kelley,* 242 Cal.App.2d 611 (1966).

Malconduct, illegal votes or error will not suffice to void an election unless the number of votes affected would change the election result. *Canales v. City of Alviso,* 3 Cal.3d 118 (1970).

Contestants have the burden of proving *how* the contested votes were cast if they are to be deducted from the total of the other candidate or side of an issue. *Russell v. McDowell, supra.*

This proof should be either "very clear" evidence, *Smith v. Thomas,* 121 Cal. 533 (1898), or "clear and convincing," *Hawkins v. Sanguinetti,* 98 Cal.App.2d 278 (1950).

The case of *Canales v. City of Alviso, supra,* is instructive.

II. ABSENTEE BALLOT PROVISIONS

A. Delivery of Absentee Ballots to Voters.

Absentee ballots must be delivered in person or by mail, and may not be given to third parties for delivery to the voter except in hardship cases as authorized by Elections Code § 1017. *62 Ops.Cal.Atty.Gen. 439 (1979).*

The exception provided by Elections Code Section 1017 pertains to voters who fail to meet the deadline for application for absentee ballots and are unable to go to the polling place due to illness, disability, architectural barriers or absence from the precinct on election day.

That such an exception cannot be construed to apply to the ordinary processing of absentee ballots is made clear by the reasoning of the foregoing Opinion of the Attorney General, as follows:

> "The words of section 1007 are clear. The Legislature has specified the elections official shall deliver the ballot to the voter personally or shall deliver it by mail to the voter. The language of section 1007 does not evidence any intent to include delivery of the ballot to the voter by any other

method than those specified. It is significant to compare the language of section 1007 with that of section 1017. Had the Legislature intended to include delivery by a voter's authorized representative in section 1007, it is reasonable to conclude it would have expressly included such a provision. (*F. Sater v. Superior Court* (1975) 15 Cal.3d 230, 237-238; *Estate ot Tkachuk* (1977) 73 Cal.App.3d 14, 18.)

Nothing in the history of section 1007 evidences a legislative intent to permit delivery of an absentee ballot to an authorized representative of the voter. To the contrary, the Elections Code of 1939 and the Political Code before it also required delivery of an absentee ballot to the voter personally or by mail. (See Elec. Code 1939, § 5902 (Stats. 1939, ch. 29, p. 221; Stats. 1955, ch. 385, p. 813, § 1); Pol. Code, § 1357 (Stats. 1923, ch. 283, p. 587, § 1).)

Construction of section 1007 to permit delivery of an absentee ballot to the voter only by mail or in person comports with the policy behind the absentee voter statutes to protect the absentee voter's right to a secret ballot. (*Scott v. Kanyon* (1940) 16 Cal.2d 197, 201; see also Cal. Const. art II, § 7; §§ 1013, 1014.)"

In *Peterson v. City of San Diego,* 134 Cal.App.3d 31 (1982), at page 442, the court cited the foregoing Attorney General's opinion with approval:

"The need to protect secrecy in absentee balloting is evidenced by a recent opinion by the Attorney General. The opinion concludes, although applications for absentee ballots may be distributed by anyone, absentee ballots must be delivered to the voter in person or by mail and may not be given to third parties for delivery to the voter."

B. Return of Absentee Ballots From Voters to Clerk

The Attorney General's opinion concludes that absentee ballots "must be returned by mail or by the voter in person and may not be returned by a third person though authorized by the voter to make the return," except in hardship cases as in Elections § 1017.

The exception provided for by Elections Code § 1017 pertains to voters who miss the deadline for requesting absentee ballots and are unable to make it to the polling place due to illness, disability, architectural barriers or absence from the precinct on election day.

That this exception does not apply to ordinary absentee ballots is made clear by the Attorney General's distinction, as follows:

> "As previously discussed, where the words of a statute are clear, they must be followed to accomplish the Legislature's intent.
>
> Section 1013 clearly specifies that an absentee ballot may only be returned to the elections official from whom it came either personally or by mail. From a comparison of the language of section 1013 with section 1017, if the Legislature intended to include delivery by an authorized representative in section 1013 it is reasonable to conclude it would have done so.
>
> Section 1017 expressly provides for delivery by an authorized representative. Since it does not limit who such a representative might be, a candidate or membr of his campaign staff could act as a voter's authorized representative.
>
> We have found nothing in the Political Reform Act (Gov. Code, § 81000 et seq.) or the Elections Code which would prevent a candidate or a member of his campaign organization from acting as a voter's authorized representative where use of an authorized representative is statutorily permitted."

In *Fair v. Hernandez,* 138 Cal.App.3d 578 (1982), the court concluded that Section 1013 required that absentee ballots be returned personally by the voter, without the use of another person or agent. *Fair* specifically stated that the use of a campaign worker to deliver absentee ballots in a city council election was sufficient to sustain challenges to those ballots, as delivery by a third person is improper under Section 1013. Objection was made to 11 absentee ballots which had been delivered to the city clerk by Fair's campaign worker. The trial court found that such delivery did violate Section 1013 and invalidated the ballots. Fair

appealed, contending in part that delivery by the campaign worker did not violate Section 1013. The appeals court agreed with Hernandez that "the ballots must be returned personally by the voter without the use of another person or agent." The court cited authority in the statute and in the Attorney General's opinion as follows:

> "First of all, it is clearly the purpose of the statute to preserve the secrecy, uniformity, and integrity of the voting process. (See *McFarland v. Spengler* (1926) 199 Cal. 147, 152 [248, P. 521].) Requiring personal delivery of the absentee ballot by the voter avoids potential problems affecting the secrecy, uniformity and integrity of the absent voter's franchise. As Justice Kaufman pointed out when this case was last before us, '[P]reservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election.' (*Fair v. Hernandez, supra,* 116 Cal.App.3d 838, 881, conc. opn. of Kaufman, J.) This important policy is admirably served by the interpretation we have placed on the statute.
>
> Such authorities as are available on the subject support the conclusion that personal delivery is required. The Attorney General in 1979 issued an opinion on this very question, stating that section 1013 required the absent voter to return the ballot personally or by mail. The Attorney General noted that section 1017 provides under special circumstances for delivery of an absentee ballot by an authorized representative. The Attorney General then stated that, 'From a comparison of the language of section 1013 with section 1017, if the Legislature intended to include delivery by an authorized representative in section 1013 it is reasonable to conclude it would have done so.' (62 Ops.Cal.Atty.Gen. 439, 443 (1979).)" *Fair v. Hernandez,* 138 Cal.App.3d 580, (1982).

In *Fair* the court drew further authority from *Beatie v. Davila,* 132 Cal.App.3d 424 (1982), stating that delivery *by mail* may be made by a third party because the Legislature recognized the impossibility of policing the act of *mailing,* but that "in person means personal delivery, since personal delivery can be policed."

The court concluded that:

> "Reason and authority both support the judgment of the trial court that delivery by a third party to the city clerk was improper under the statute. The rule requiring personal delivery clearly serves the paramount purpose of preserving the secrecy, uniformity, and integrity of the voting process."

III. THE FACTUAL ISSUES

Contestants' basic challenge to the validity of the East Palo Alto election goes to the absentee ballot procedures followed by the proponents of incorporation.

But for the 272 absentee ballots cast, incorporation would have been defeated by a margin of 70 votes. Of votes cast at the polls *on election day,* the vote was 1678 to 1599 *against* incorporation.

The 272 absentee votes, however, (out of 274 cast) turned the issue completely around, being 183 to 89 *for* incorporation, thereby turning a 79 vote defeat into a 15 vote victory for incorporation.

With this in mind, contestants since the election on June 7 have concentrated their inquiries into the procedures followed by the committee for incorporation, EPACCI, in obtaining absentee ballots. Those procedures appear to be in clear violation of the basic California statutory and case law pertaining to absentee ballots. Among other things, EPACCI members solicited the mailing of absentee ballots to third parties for transmission to individual voters.

Two of EPACCI's primary leaders, Joseph Goodwill and Carmeleit Oakes, actually punched out ballots for a number of voters, in violation of Court-declared protective rules.

A large number of absentee ballots appear to have been delivered to the Clerk by the hand of 3rd parties, rather than by mail.

With respect to the order of proof, contestants would therefore like to commence with the 17 ballots mailed by the County

Clerk's office to Joseph Goodwill. These will be challenged on several grounds.

First, these ballots were mailed by the Clerk in violation of Section 1007(b) of the Elections Code, not to the voter himself, but to Goodwill, a party known by the Clerk's office to be identified with the proponents of incorporation.

Fourth, one of the 17 ballots mailed to Goodwill was returned by the hand delivery of a third party.

Fifth, the Clerk's office erred in failing to compare some of these absentee ballot application signatures and addresses with original affidavits of registration as required by Section 1007 of the Elections Code:

§ 1007. *Procedure upon receipt of absentee ballot*

(a) Upon receipt of any absentee ballot application signed by the voter, which arrives within the proper time, the elections official should determine if the signature and residence address on the ballot application appear to be the same as that on the original affidavit of registration. The official may make this signature check upon receiving the voted ballot, but the signature must be compared before the absent voter ballot is canvassed.

(b) If the official deems the applicant entitled to an absent voter's ballot he or she shall deliver by mail or in person the appropriate ballot.

(c) If the official determines that an application does not contain all of the information prescribed in Section 1002 or 1006, or for any other reason is defective, and the election official is able to ascertain the voter's address, the official shall, within one working day of receiving the application, mail the voter an absent voter's ballot together with a notice. The notice shall inform the voter that the voter's absent voter's ballot shall not be counted unless the applicant provides the official with the missing information or corrects the defects prior to, or at the time of, receipt of the voter's executed absent voter's ballot. The notice shall specifically inform the voter of the information that is required or the

reason for the defects in the application, and shall state the procedure necessary to remedy the defective application.

If the voter substantially complies with the requirements contained in the official's notice, the voter's ballot shall be counted.

In determining from the records of registration if the signature and residence address on the application appear to be the same as that on the original affidavit of registration, the clerk or registrar of voters may use the duplicate file of affidavits of registered voters or the facsimiles of voter's signatures, provided that the method of preparing and displaying the facsimiles complies with law.

Sixth, in some cases the Clerk's office made errors in comparing absentee ballot envelope signatures with absentee ballot application signatures as required by Section 1015 of the Elections Code:

§ 1015. *Receipt of absentee ballot; comparison of signatures; variation of signature; rejection, use of application rather than affidavit to make signature check; removal of ballot from identification envelope; rejection of ballot for cause after envelope has been opened.*

Upon receipt of the absentee ballot the elections official shall compare the signature on the envelope with that appearing on the affidavit of registration and, if they compare, deposit the ballot, still in the identification envelope, in a ballot container in his office. A variation of the signature caused by the substitution of initials for the first or middle name, or both, shall not invalidate the ballot. If the ballot is rejected because the signatures do not compare, the envelope shall not be opened and the ballot shall not be counted. The cause of the rejection shall be written on the face of the identification envelope.

If the elections official has compared the signature of the voter's application with the affidavit pursuant to Section 1007, the application may be used rather than the affidavit to make the signature check required by this section.

No ballot shall be removed from its identification envelope until the time for processing. No ballot shall be rejected for cause after the envelope has been opened.

It seems reasonable that the parties work out a pretrail agreement as to how the order of proof should proceed in this category and the others thus far developed by investigation.

Dated: July 20, 1983

Respectfully submitted,

Paul N. McCloskey, Jr.
Brobeck, Phleger & Harrison

By PAUL N. McCLOSKEY, JR.
Paul N. McCloskey, Jr.
Attorneys for Contestants

Court of Appeal
State of California
First Appellate District

No. A024878

Gertrude Wilks, et al.,
Contestants and Appellants,

vs.

Barbara A. Mouton, et al.,
Defendants and Respondents.

[Filed March 15, 1984]

Appellants' Reply Brief and Brief in Response to Cross-Appeal

On Appeal from the Decision of the
Honorable John F. Cruikshank, Jr.,
Judge of the Superior Court, County of San Mateo

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Attorneys for Contestants
and Appellants Gertrude Wilks, et al.

Court of Appeal
State of California
First Appellate District

No. A024878

Gertrude Wilks, et al.,
Contestants and Appellants,

vs.

Barbara A. Mouton, et al.,
Defendants and Respondents.

Appellants' Reply Brief and Brief in Response to Cross-Appeal

PRELIMINARY

In this Reply Brief, Appellants will limit their arguments to the legal issues raised by Respondents' briefs, accepting for purposes of argument that the Findings of Fact of the Trial Court are adequately supported by the evidence.

Respondents have devoted the bulk of their lenghty briefs, (55 of 88 pages in the case of Respondent City and 32 of 63 pages in the case of Respondent County) to issues of fraud and the credibility of witnesses.

These are not the issues raised in this appeal. That Respondents have chosen to devote so much of their briefs to the non-issues of fraud and credibility might be taken as a signal that their arguments on the legal issues are relatively weak. Indeed, on key

legal issues addressed in Appellants' Opening Brief Respondents have made no response at all.

This case is an election contest, and as such, is of necessity limited to challenges to specific ballots based on specific language in the California Constitution or in California statutes. The relevant authorities are:

(1) The mandate of *Article II, Section 7 of the California Constitution:*

> "Voting shall be secret,"

(2) *Elections Code, § 20021, subsection (d):*

> "(d) That illegal votes were cast," and

(3) *Elections Code, § 20021, subsections (a) and (e):*

> "That election officials were guilty of malconduct of error sufficient to change the result of the election."

In the non-secret category, 49 ballots were involved, 17 of which were actually punched out by a campaign worker rather than the voter.[1]

In the illegally-cast category, six sub-categories involving four Elections Code Sections (§§ 1007, 1009, 1013 and 1015) pertain. These are:

(a) 46 ballots hand-delivered to the Clerk's office in violation of Elections Code § 1013 and *Fair v. Hernandez,* 138 Cal.App.3d 578 (1982)[2]

(b) 17 ballots where the testimony was undisputed that the voter did not reside at the residence from which he or she was

---

[1] Respondents correctly point out that 2 of those 49 non-secret ballots, those of Joe Minter and Aron Strong, were invalidated by the trial court on residency grounds, reducing the total number of challenged ballots in this category to 47.

[2] The ballots of Aron Strong and Joe Minter were also included in this group; their invalidation by the Trial Court on residency grounds reduces the number challenged on appeal to 44.

registered as of the date of election or within 29 days prior to thereto;

(c) 16 ballots mailed to a campaign worker rather than the voter in violation of Elections Code § 1007;

(d) 15 ballots returned with a different residence address than the voter's in violation of Elections Code § 1009;

(e) 1 ballot not signed by the voter in violation of Elections Code § 1009;

(f) 1 ballot hand-delivered to the Clerk's office or polling place in violation of Elections Code § 1013 and *Fair v. Hernandez, supra.*

The malconduct and error of election officials follow from the acceptance and counting of ballots in five of the six illegally-cast ballot categories (a), (c), (d), (e) and (f). In four of these six categories, the category alone by itself contained more than the number of ballots necessary to change the election result.

This case raises two legal issues of paramount importance to the future of California absentee ballot election procedures, involving (1) secrecy and (2) Elections Code § 1013 prohibiting return of absentee ballots by the hand delivery of third persons.

Respondents' arguments, if upheld, would not only effectively end the right of secrecy in absentee balloting, but would overrule the two major California appellate decisions upholding Elections Code § 1013 itself. This brief will concentrate on Respondents' arguments on these two issues.

THE SECRECY QUESTION

The Findings of Fact establish that the proponents of incorporation set up a deliberate absentee ballot program whereby four individual pro-incorporation leaders, Goodwill, Oakes, Satterwhite and Davis, went unsolicited into the homes of voters unrelated to them and there assisted voters in punching out their absentee ballots, either doing so themselves, or showing the voters how and where to punch the ballots. (Findings of Fact 2, 3, 4, 9, 10, 15, 16, 17 and 19.)

Respondents do not deny that 17 of these ballots were punched out, not by the voter but by the visiting campaign worker. These 17 ballots are listed at page 10 of Appellant's Opening Brief. Likewise, Respondents do not claim that any of these 17 voters were related in any way to the campaign worker who voted their ballot. The evidence at trial indicates clearly that they were not so related.[3]

RESPONDENTS' ARGUMENTS ON THE SECRECY ISSUE

The secrecy arguments of Respondents City and County are found in pages 56 through 68, and pages 32 through 36, of their respective briefs.

These arguments are essentially four in number, and on two key points Respondents have specifically declined to argue at all.

1. *The Argument in the Trial Court*

Both Respondents argue that the secrecy issue cannot be raised on appeal since Appellant's counsel allegedly conceded the issue at trial. (Respondent City's Brief, pages 56-57; Respondent County's Brief, page 32.)

Respondents misstate the record.

Appellants raised the secrecy issue throughout the trial and focused on secrecy as their primary argument in their Supplemental Memorandum of Points and Authorities filed September 14, 1983. Three brief quotes from Appellants' Memorandum (C.T., pages 424 and 425) should suffice:

> "There are three separate categories of absentee ballots which Contestants allege were illegally cast in the June 7, 1983, election.

---

[3] The sole claims of relationship between the voter and any of the campaign workers was found in the testimony of Joseph Goodwill, who testified that some absentee ballots which he collected were from relatives. None of those are included in the 17 ballots punched out by campaign workers rather than by the voters involved. (R.T., page 1393, line 4 through page 1394, line 13.)

"First are those ballots which were not cast secretly by the voter but instead were cast by a third person . . . ."

(C.T., page 424.)

"The Secrecy Issue

The secret ballot is 'the very foundation of our election system.' 'The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained.' *Scott v. Kenyon,* 16 Cal.2d 197, 203 (1940)."

(C.T., page 425.)

In opening oral argument, Counsel for Appellants commenced his argument with these words:

"Your Honor, I might say that if it please the Court, that we have broken down the challenged ballots into three categories. The first on the secrecy question . . . .

(R.T., page 3542, lines 2-5.)

Appellants' secrecy argument continued for 34 pages of the Reporter's Transcript, commencing on page 3542 and ending with this exchange on pages 3575-3576:

MR. McCLOSKEY: "Now, that's the secrecy case, Your Honor. Thirty-three testified to by Satterwhite, Oakes and Goodwill that they went through this process, six more added by additional witnesses of the total of the 39 ballots that were not cast in secrecy.

"You then have this list of the people who say they either didn't vote at all or that somebody else cast their ballot or punched it out. That's the secrecy case. If you want to stop at this point."

THE COURT: "Yes, let's stop and take a little lunch."

In closing argument, Counsel for Appellants again stressed the secrecy question. Commencing closing argument, at page 3670 of the Reporter's Transcipt:

MR. McCLOSKEY: "Your Honor, let me just address, briefly in rebuttal, the two legal matters.

"I think the court will take note that on the secrecy issue, there was not one word of reference to the *Scott v. Kenyon* case or the discussion in the *Peterson* case about secrecy. We think that *Scott v. Kenyon* and the language cited in our brief on secrecy clearly makes it relevant to this case.

"I would point out, Your Honor, that as Mr. Adams has pointed out, there is no case which has struck down the kind of pattern of conduct that was followed here. The pattern of going into a person's home or his rest home and poking out the ballots themselves.

"Let me read from *Beatie v. Davila* which is the case they rely on:

'On a number of occasions a committee member stood next to the voter while he or she voted and would indicate to the voter the names of the candidates the committee was supporting in the election. However, a committee member never marked the ballot or told the voter how to mark the ballot.'

"Take the case of Mrs. Oakes. Six ballots that Mrs. Oakes stated. She went in and marked the ballots for the voters themselves. That's a new case. There's nothing like it in the case books that's in Your Honor's hands to rule whether that policy violates the constitutional secrecy requirements.

THE COURT: "I suggest you read *Fair v. Hernandez*, first case, 117 Cal. Ap. 3rd, 868, bottom of page 878 up to the top of page 879. I'll quote it:

'After considerable evidence, the Court determined that, one, the absentee vote of Augustine Mayoral (Exhibit 7) was cast with the assistance of the voter's wife in the privacy of their common home, and only in the presence of each other, when the voter was partially physically disabled.

'And, two, that the absentee vote of Molly Lizarde (Exhibit 86) was filled out by Irene Lizarde at the specific request and authorization of the voter, in the privacy of their common home, and only in the presence of each other when the voter was partially physically disabled.

'Implicitly the Court found that Sections 14234, 14235 and 14236 do not apply to the absentee votes not cast at the polling place. We agree. Furthermore, where the evidence is in conflict this Court will not disturb the findings of the trial court where, as here, they are supported by substantial difference.' "

MR. McCLOSKEY: "But note the difference, Your Honor. Note the difference between in the privacy of home, a husband and wife or two relatives."

(R.T., page 3670, line 13 through page 3672, line 16.)

At page 3676 of the Reporter's Transcript:

MR. McCLOSKEY: "The whole fundamental question of secrecy of the ballot was that the person himself or herself would not fear retribution and would be able to cast that ballot in secret.

"Now, these people in East Palo Alto, the elderly, the infirm, the sick, the young and the unsophisticated, are they really about to say to a stranger that comes to their door, 'No, we don't want you to help us make out our ballot.'

"Sure, perhaps people secure in their beliefs would say, 'Yes, I insist on my right to privacy. I want to cast my ballot in privacy. You go away.'

"But here the plan was specifically just exactly as Mrs. Oakes said it. 'There were people out there we wanted to go out and "instruct" in the use of their ballots. And that's really the primary issue before the Court, is that secrecy question of those 40 voters."

(R.T., page 3676, lines 12-26.)

That the Trial Court recognized secrecy as the primary issue is reflected in the first words of the oral opinion the Trial Court rendered at the close of argument, commencing at page 3683 of the Reporter's Transcript:

THE COURT: "Now, we got the process of the secrecy. I think I should discuss that first.

"Now, I'm going to give my conclusion first and that is, I don't think *Fair v. Hernandez* applies in this case, considering—concerning the hand-carried ballots. I'll tell you why.

"If you read *Fair v. Hernandez,* and more particularly, *Beatie v. Davila,* that is not talking about the proposition of mailing or hand-carrying it. The gist of the decision is the fact that we must do this to preserve the secrecy, to prevent the potential fraud, right?

"Now, in this case I think this is distinguished. We've had evidence placed before the Court and based on the evidence that I heard, I don't see any fraud.

"Now, if there's no fraud, then why should the rule versus *Fair v. Hernandez* come to play? Because the whole basis of *Fair v. Hernandez* is on the proposition—I cite page 583, 138 Cal.Ap. 3rd, 588. 'Moreover—'

"And this is in *Fair*—

'The integrity and secrecy of the process are such important interests that ballots may be voided even though it is not shown that the ballots were actually tampered with.'

"In this case the evidence shows that the ballots were tampered with. So, I don't have to apply *Fair v. Hernandez,* and, more particularly, when we go into the language of *Beatie v. Davila,* on page 432, 132 Cal. Ap. 3rd, 432.

'Nevertheless, absent proof of fraud or tampering, or proof that the sealed envelope has been opened or its contents otherwise viewed by a third party before its return to the elections official, the mere possibility of wrongdoing and intrusion into the secrecy of the ballot does not suffice to vitiate either the ballot or the election.'

"So it seems to me that the key proposition when we talk about secrecy is in the absence of fraud, we want to do these things to protect the secrecy.

"Now, getting back to the secrecy argument and still dealing with *Beatie v. Davila* on pages 430, 431. The problem with

appelant [sic] secrecy argument in the present case is twofold.

"First, unlike *Scott v. Kenyon supra,* 16 Cal.2nd, 197, there is no proof that the secrecy of any absentee ballot was intruded upon after the ballot was taken from the voter. The only time can be said that the [sic] voter right to secrecy was compromised was when the voter marked his ballot in the presence of the campaign representative before placing it in the identification envelope.

"However, if a voter wishes to disclose his marked ballot to someone else, be it family member, friend, or candidate's representative, he should be permitted to do so. To hold otherwise would cast appall [sic] on absentee voting."

(R.T., page 3683, line 16 through page 3685, line 17.)

These comments not only reflect the complete misconception of the Trial Court on the secrecy issue, *Fair* and *Beatie*, but they also make clear that secrecy was a primary concern in the Trial Court's thinking. For Respondents to urge that Appellants did not raise the secrecy issue at trial is an obvious misstatement.

The single comment of Appellants' counsel which Respondents claim served to waive the secrecy issue was an argument made in response to an evidentiary objection, not on the merits of the case.

The Reporter's Transcript cited by Respondents (R.T., pages 779-782) reflects that campaign worker Brad Davis testified that he had punched out the ballots of three rest home residents at their request. Counsel for Appellants asked if the voters had instructed Davis to cast their ballots for incorporation. Counsel for Respondent City objected on the privacy ground that Davis was acting as the "confidential agent" of the voter; the Trial Judge sustained.

Counsel for Appellants then argued:

MR. McCLOSKEY: "The purpose that the voter not be asked how he or she voted is to protect the privacy of the voter under the constitutional secrecy provision. The exception to that under the cases is that the voter can ask somebody to assist them and waive that privacy right. When

that privacy right is waived as to that agent, in my judgment, Your Honor, the secrecy right is waived as to the Court and to the public as well as to the agent.

"I know of no privilege, attorney-client, minister, husband-wife, that would say that once the secrecy provision of the ballot is waived that it is not waived to others.

"Now, I'm arguing without reference to the cases. I've not looked at the cases."

(R.T., page 781, lines 1-13.)

The single case that *did* allow voters to waive the secrecy right, and to which counsel had reference, was the first *Fair v. Hernandez,* 116 Cal.App.3d 868 (1981), *cert. denied* 454 U.S. 941 (1981), where the court specifically permitted the two voters, each partially physically disabled, to obtain the help of a close relative who lived with them, and which the Trial Court discussed during the final arguments. (See page 7 hereof.) Appellants have not questioned the validity of this narrow exception to the secrecy rule, but neither does comment on this exception reduce the strength of the secrecy argument on the merits which Appellants made to the Trial Court and repeat here.

It is respectfully submitted that Counsel for Appellant was correct on the evidentiary point and that the Trial Court erred, but in any event the argument on the evidentiary objection certainly did not indicate Appellants were abandoning a challenge to the non-secrecy of ballots in the trial court which were not within the *Fair I* exception.

2. *The Peterson and Beatie Decisions*

Respondents next argue that the recent decisions in *Peterson v. City of San Diego,* 34 Cal.3d 225 (1983) and in *Beatie v. Davila,* 132 Cal.App.3d 424 (1982) legitimate the non-secret ballot procedure followed in East Palo Alto on June 7, 1983.

Respondent City argues that *Peterson v. City of San Diego, supra* "refused to allow the secrecy provision in the California Constitution as a sword to invalidate votes." (Respondent City's Brief, page 60.)

This is poppycock. *Peterson,* specifically mentioning that the court had seen "no showing of significant wrongdoing in absentee or mail ballot voting" (*id.* at page 231) justified the all-mail ballot procedure by *pointing out* that the secrecy provisions of the Constitution and statutory law *protected* the absentee ballot procedure. The Court particularly cited Elections Code § 29645's provision making "any person who interferes or attempts to interfere with the secrecy of voting" guilty of a felony.

The whole *process* followed by campaign workers Goodwill, Oakes, Satterwhite and Davis was calculated to result in interfering with the secrecy of voting. The record amply supports this conclusion, as indeed do the Trial Court's own Findings of Fact 9 and 10 (Goodwill), 15 (Oakes), 17 (Satterwhite), and 19 (Davis).

Beatie can actually be construed as *supporting* Appellant's position. The court said:

> "However, if a voter wishes to *disclose* his *marked* ballot to someone else, be it a family member, friend or a candidate's representative, *he should be permitted to do so.*" (*Beatie v. Davila,* 132 Cal.App.3d 424, 430-431 (1982) (emphasis added).)

Beatie further pointed out:

> "[A] committee member stood next to the voter while he or she voted and would indicate to the voter the names of the candidates the committee was supporting in the election; however, *a committee member never marked the ballot or told the voter how to make his ballot.*" (*Id.* at 427, emphasis added.)

In the case at Bar, the voter's right to disclose his already-marked ballot is not at issue. The casting of his ballot *by another person* is the issue. The clear inference from *Beatie* is that *had* the campaign worker actually marked the voter's ballot, it would have been held to have been illegally cast.

3. *Appellants' Standing to Raise the Secrecy Issue*

Respondents next argue that election contestants have no standing to raise the secrecy issue as to other people's ballots (Respondent City's Brief, page 62) citing four cases for this alleged principle (*Werner v. Times-Mirror Co.*, 193 Cal.App.2d 111 (1961); *James v. Screen Gems, Inc.*, 174 Cal.App.2d 650 (1959); *Metter v. L.A. Examiner*, 35 Cal.App.2d 304 (1939); and *Ion Equipment Corp. v. Nelson*, 110 Cal.App.3d 868 (1980)).

None of these four cases, however, involve a voter's right to vote in secret. All four recite only the well-known rule that one person cannot claim *damages* for the invasion of the privacy of another.

Appellants, as election contestants, clearly have standing to challenge ballots that were not cast in secret in violation of the California Constitution. If election contestants can't challenge non-secret ballots, who can? In the case at Bar, three of the Contestants *did* challenge the casting of their ballots by others (Mary White, Grant White and Roy Ashford), and presumably the right not to have one's vote "wrongfully denied, debased or polluted" guaranteed in *Hadley v. Junior College Dist.*, 397 U.S. 50, 52 (1970).

4. *The Waiver Question*

This leaves Respondents to the single argument that the 17 ballots punched out by campaign workers were valid because the voter involved "waived" his or her right to secrecy, as the Trial Court concluded as a matter of law in Conclusion No. 5.

Significantly, however, neither Respondent City nor Respondent County has chosen in their lengthy briefs to rebut the cases cited in Appellant's Opening Brief limiting the application of the waiver doctrine to certain *factual* situations.

Appellants argued:

(1) Waiver is the intentional relinquishment of *a known right after knowledge of the facts* (*Bohlert v. Spartan Ins. Co.*, 3 Cal.App.3d 113, 118 (1969));

(2) The party *claiming* waiver has the burden of proving it by clear and convincing evidence;

(3) Doubtful cases will be decided *against* a waiver; and

(4) The rule of clear and convincing evidence of waiver "is particularly apropos in cases in which the right in question is one that is 'favored in the law.' " (*City of Ukiah v. Fones,* 64 Cal.2d 104, 107-108 (1966).

Respondents' decision not to argue these legal principles may perhaps stem from the fact that the Trial Court itself was unable to make a finding of fact that a waiver of the constitutional right of secrecy occurred, and did no more than reach a legal conclusion to this effect by reason of finding that the ballots had been cast with the voter's "understanding and consent."

Understanding and consent, however, do not necessarily constitute waiver, unless *knowledge* of the voter's right to a secret ballot was present. The more important the right, the more reluctant the courts have been to find waiver without knowledge. There is no testimony *anywhere* in the record to suggest such knowledge or even the *inference* of such knowledge on the part of any one of the 17 voters that he or she was waiving a constitutional right when the campaign worker was permitted to cast his or her ballot. Indeed, the whole record indicates exactly the opposite with respect to these voters whom Respondents' counsel characterized as "simple people, unsophisticated and generally uneducated." (R.T., page A-10.)

There is, therefore, no evidence in the record or in the Findings of Fact to support the Trial Court's Conclusion of Law No. 5:

> "The constitutional rights to a secret ballot and to privacy were not violated because the evidence shows that all of the voters who showed their ballots to third parties or who obtained assistance from third parties did so voluntarily *and waived such rights.*" (Emphasis added.)

5. *Previous Cases where a Waiver of Secrecy Allegedly Occurred*

In addition to the first *Fair v. Hernandez* approval of the waiver of secrecy by allowing a wife or close relative to assist in casting an absentee ballot, Respondents have cited only one other case to support their argument that secrecy can be waived. This is *Shinn v. Heusner,* 91 Cal.App.2d 248 (1949), where Heusner, a candidate for county supervisor, was also a deputy county clerk and in that case authorized to:

> "renders service to the county clerk in the delivery of blank application forms, in receiving applications for absentee ballots, in delivering ballots in response thereto, and in the reception from the voters of their voted identification envelopes and the return of same to the county clerk's office; *all of which duties Heusner evidently performed as one authorized to do so.*" (*Id.* at page 252, emphasis added.)

While the opinion refers earlier to the *argument* of appellant that Heusner "went to the home" of one elector who had properly requested such a ballot and "voted this elector" (*id.* at page 251), the appellate court did not include this allegation in the list of actions the trial court found Heusner to have performed.

A careful reading of *Shinn* thus fails to provide any support for the concept that a deputy county clerk can "vote another's ballot," let alone a stranger, as in the case at bar.

6. *The Statutory Prohibition against Interference with Absentee Ballot Secrecy*

There is one other significant omission in Respondents' briefs on the secrecy question. Respondents wholly fail to address the public policy set forth in Elections Code § 29645 making it a felony to interfere or attempt to interfere with the secrecy of voting.

This prohibition against interference with the secrecy of absentee ballots was expressly mentioned in *Peterson* as a necessary protection for the absentee ballot and mail ballot procedures.

The Chairperson of the pro-incorporation committee, Carmaleit Oakes, designed and testified to a *program* designed to interfere with the secrecy of absentee balloting (R.T., page 512, lines 4-110. The Trial Court found:

> "She visited those five voters after enough time had elapsed for them to have received their absentee ballots. She was invited into their homes. *She offered to help them with their ballots.*" (Finding of Fact No. 15.)

If Elections Code § 29645 is to have any meaning at all, it cannot be construed to permit campaign workers to deliberately visit voters' homes for the purpose of publicly punching out their absentee ballots even though the voters themselves may not object. Respondents' silence on this issue indicates an inability to argue to the contrary.

7. *The Prayer for Prospective Application of Any Protection of Secrecy Decision*

Respondent City raises a final argument that seems to concede Respondents' weakness on the secrecy issue.

Respondent City, at pages 65 through 68 of its brief, prays that any ruling requiring secrecy in absentee voting be made prospective only, citing *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) and *Ralston Purina v. County of Los Angeles,* 56 Cal.App.3d 547 (1976). Respondent City concedes the three factors required: (1) that the decision must establish a new principle of law . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed, (2) that a retroactive application will not serve the purpose of the new ruling, and (3) the inequity of retroactive application.

The East Palo Alto case meets none of these three criteria.

In all three instances, Respondents assume that it is in the best interests of the people of East Palo Alto that incorporation be upheld, and they totally ignore the constitutional right of dissenting voters, likewise upheld by the U.S. Supreme Court, not to have their votes wrongfully denied, debased or polluted. *Hadley v. Junior College Dist., supra.*

Respondents argue that the voters and people who helped them vote for incorporation acted in good faith. Even assuming that this were so, the California courts have not hesitated to invalidate votes cast in good faith where that invalidation violated the integrity and secrecy of the voting process, even where election results were changed thereby.

As the first *Fair v. Hernandez* pointed out:

> "Preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election." (*Id.* at page 582.)
>
> "Moreover, the integrity and secrecy of the process are such important interests that ballots may be voided even though it is not shown that the ballots were actually tampered with." (*Id.* at page 583.)

In *Scott v. Kenyon,* 16 Cal.2d 197 (1940), 9 absentee ballots crucial to the vote were invalidated when the voters themselves acted entirely in good faith and only the election officials were guilty of malconduct.

THE 44 HAND-DELIVERED BALLOTS CHALLENGED ON APPEAL

The facts supporting Contestants' challenge to these ballots are found in Findings of Fact Nos. 11, 15, 18, and 21 through 29, reflecting the following:

Forty-four absentee ballots were picked up from voters and hand-delivered by Goodwill (28 ballots), Oakes (5 ballots) and Davis (11 ballots) to a vacant desk at the pro-incorporation campaign committee headquarters. Only Oakes was a deputy registrar.

After remaining on the vacant desk for an indeterminate period of time, these 44 ballots were picked up by Onyango Bashir, a deputy registrar, and hand-delivered to the County Clerk's office between May 9 and May 24, 1983.

As of the election date, June 7, 1983, Respondents concede that the County Clerk had never authorized a deputy registrar to pick up absentee ballots.

On May 24 the County Clerk refused to accept further hand-delivered ballots unless delivered by the voter himself, reaching such decision on the basis of the second *Fair v. Hernandez* decision. Bashir was advised that he should mail in any further absentee ballots coming into his possession.

Nevertheless, the Clerk accepted the 44 ballots previously hand-delivered by Bashir, and upon opening the ballot box on June 3, 1983, transported them to election headquarters where they were subsequently counted and included in the final vote totals.

In an almost identical case in Los Angeles County, the Los Angeles County Registrar Recorder refused to count 354 absentee ballots hand-delivered by campaign workers in a Pomona School Board election. The Los Angeles Superior Court per Judge Charles Jones, Department 82, relying on *Fair,* sustained defendant's demurrer to contestant's complaint without leave to amend on January 9, 1984. (*Samora v. McCracken,* Action AO47939, Superior Court, County of Los Angeles).

RESPONDENTS' ARGUMENT ON THE HAND-CARRIED BALLOTS

1. *The Plain Meaning of Elections Code § 1013*

While Respondents vehemently challenge second *Fair v. Hernandez* and its reasoning, their briefs significantly fail to seriously address the clear and precise language of Elections Code § 1013 upon which *Fair* is based:

> "After marking the ballot, the absentee voter may return it to the official from whom it came by mail or in person. . . . "

Respondents, in discussing *Fair,* merely suggest that Elections Code § 1001's general mandate, "This division shall be liberally construed in favor of the absent voter," should have been construed by the *Fair* court to override the specific requirement of § 1013 that absentee ballots be delivered "by mail or in person."

Respondents cite no case authority for this novel proposal of statutory construction. If their reasoning is accepted, none of the precise statutory provisions of the elections Code specifying how ballots are to be cast would necessarily result in a ballot being "illegally cast."

The statute is plain. To be legally cast an absentee ballot must be returned by mail or in person. These 44 ballots were not. Ergo, they were illegally cast.

2. Respondents' Attack on *Fair v. Hernandez I*

Respondents in both of their briefs attack *Fair* head on, urging not only that its holding has been invalidated by *Peterson* (Respondent City's Brief, page 71; Respondent County's Brief, page 38), but that it "is a maverick decision and should not be followed" (Respondent City's brief, page 73) and that "the holding in *Fair* is erroneous" (Respondent County's Brief, page 43.)

Peterson makes no reference to *Fair,* and it is difficult to understand how *Peterson's* approval of mail ballots as against the danger of abuse of the secrecy privilege can be construed to invalidate *Fair's* simple verification of the precise language of

Elections Code § 1013 requiring return of ballots either by mail or in person.

Likewise, it is difficult to follow Respondent's reasoning that the upholding of § 1013 somehow violates anyone's constitutional rights.

How can it be a violation of a constitutional right to vote if the California Legislature establishes the rule that absentee ballots be returned to the election headquarters by mail or in person . . . or in sealed envelopes . . . or bearing the voter's signature and address? Clearly, the Legislature can establish reasonable rules to govern the voting process.

3. Respondents' Failure to Mention *Beatie v. Davila's* Specific Approval of *Fair* II's Rationale

The reasoning in *Fair* II, a Fourth District decision, is also approved of in *Beatie v. Davila, supra,* a Fifth District decision handed down only a few months earlier.

Beatie construed elections Code § 1013 language allowing the absentee voter to return his ballot "by mail or in person" to mean that the voter could give his ballot to a 3rd person to *mail,* although conceding that the voter could not give it to a 3rd person to hand-deliver. Confronted with the inconsistency of these two results, the court applied ordinary rules of statutory interpretation to find that the statute expressly authorized two methods of return, either (1) by mail, or (2) in person.

The court said, at page 429:

> "One may logically ask: Why would the Legislature require the voter to deliver his absentee ballot personally to the elections official and yet allow him to utilize a third party for mailing it to the official. We think the answer to the question is clear. The Legislature recognized the impossibility of policing the act of mailing by the absentee voter . . . ." (*Beatie v. Davila,* 132 Cal.App.3d 424, 429 (1982).)

Thus, *Beatie v. Davila,* as Respondents point out, later referred to with approval by the Supreme Court in *Peterson,* confirms the validity of *Fair* II's reasoning that the Legislature properly pro-

hibited utilization of a 3rd party for hand-delivery, . . . an act which the election official *could* police (and for which he would presumably be guilty of malconduct if he did not).

4. The Bootstrap Argument that *Beatie* and *Fair* together Create an Unconstitutional Distinction

Respondents next argue that if *Beatie v. Davila* is correct, it creates an unconstitutional distinction between absentee ballots that are mailed as opposed to being hand-carried. In effect, this argument rejects *Beatie's* reasoning for the distinction made by the Legislature, but demands that *Beatie* results in overturning the Legislature's clear and plain language prohibiting hand-delivery . . . by itself a perfectly valid prohibition . . . This is a bootstrap argument. If *Beatie's* reasoning is right, then *Fair's* prohibition of hand-delivery is acceptable; if *Beatie's* reasoning is wrong, then *both* mail and hand-delivery by 3rd persons is prohibited.

Respondents can't argue that *Beatie* is right in its reasoning and thereby create for themselves an unconstitutional distinction which *Beatie* itself rejects.

5. The Due Process Question and *Griffin v. Burns*

Respondent City cites *Griffin v. Burns*, 431 F.Supp. 1361 (1977), *aff'd* 570 F.2d 1065 (1978) for its proposition that it is a denial of due process by a state to allow voters to vote absentee ballots and then have the state court hold that absentee ballots were not permitted in the election in question. (Respondent City's Brief, page 77.)

Griffin, however, rested on the court's finding that almost 10% of the voters "were doing no more than following the *instructions* of the officials charged with running the election (*ibid.* 570 F.2d at 1075).

No such instructions were given in the East Palo Alto election. Four individuals, two of them deputy voting registrars, elected to hand deliver absentee ballots *without knowing* that this was prohibited by law.

In effect Respondents would stretch a court decision invalidating improper *instructions* to voters by election officials into the requirement of an *affirmative duty* on the part of such officials to fully advise voters of all actions *prohibited* by law. No case has been cited which creates such an affirmative duty, and *Griffin* is not analogous to the case at Bar.

Significantly, Respondents make no response in their reply briefs to the square holding in the first *Fair v. Hernandez, supra,* cited by Appellants at page 36 of their Opening Brief.

There the court invalidated an absentee ballot which the voter had improperly marked at the explicit direction of an election official.

The court said, at page 878:

> "Neither the Registrar nor the court has authority to change the laws. It is most unfortunate that the voters is deprived of her franchise through the fault of an official, but no exception exists to cover the circumstance," (Citing *Patterson v. Hanley*, 136 Cal. 265, 276 (1902)).
>
> "This vote must be deducted from Hernandez's total, reducing it to 791."

In *Griffin*, the state official, not the local official, directed the invalid procedure, and almost 10% of the electorate was involved, not 44 voters out of more than 3500 participating.

Respondents' argument would allow the perpetrators of this election code violation and malconduct to benefit by their wrongdoing.

RESPONDENTS' CROSS APPEAL

Respondents City and County each appeal the Trial Court's decision that two voters who admittedly moved their domicile out of East Palo Alto within 28 days prior to the June 7, 1983 incorporation election were not qualified electors *in that election.*

Respondents cite Election Code § 217 as their sole authority for their appeal, and indeed, on the face of it, § 217 would seem to

permit a voter to vote in a precinct where he resided within 28 days of the election.

The purpose of this section, however, is to prevent disenfranchisement of voters; this did not occur here where the only vote in San Mateo County on June 7, 1983, was for the incorporation of East Palo Alto.

Elections Code § 100, moreover, provides the basic criteria that a voter is entitled to vote "at any election held within the territory *within which he resides.*"

Government Code § 56440, covering elections under the District Reorganization act which applied to the East Palo Alto election, limits the area within which an election is held to the "territory" affected thereby. In *Singletary v. Kelley,* 242 Cal.App.2d 611 (1966), 27 ballots cast by persons not then living within the boundaries of the proposed city were held to have been illegally cast.

Franchia Gibson and Robert Long, having moved out of the territory affected by the election, should not have been entitled to vote on the issue of incorporation of that territory.

RELIEF SOUGHT

Respondents in their briefs have not challenged Exhibit D in Appellants Opening Brief listing the 17 challenged voters whose testimony in the record established that they were either (1) cast for incorporation, (2) believed by the voter to have been cast for incorporation, or (3) unknown to the voter as to how they were cast but punched out by Goodwill, Oakes or Blakey.

1. *The Secrecy-Challenged Ballots*

This category includes all 17 of the secrecy-challenged ballots admittedly punched out by Goodwill, Oakes, Blakey, Satterwhite and Davis, as well as 8 additional ballots where Goodwill stated he "might have punched out the ballot," where it was conceded that he "assisted" the voter, or where the voter didn't know *how* the campaign worker had punched out his or her ballot.

These ballots, for the Court's convenience, are listed below:

Ballots Admitted Punched Out for Incorporation by Campaign Workers and Challenged on Secrecy Grounds

(1) Lillie Howard
(2) James Howard
(3) Roy Lee Ashford
(4) Alice Harvey
(5) Robbie Lee Shephard
(6) Anitra Gilbert
(7) Mary (Owens) White
(8) Grant White
(9) Geraldine Gadlin
(10) Calvin Dixon
(11) Matielda Dixon
(12) Rosa Lee Ahern
(13) Amos Brandon
(14) Betty Brandon
(15) Luberta Brookter
(16) Mary Hall
(17) James Fields

Ballots Admittedly Punched Out for Incorporation with the "Assistance" of Campaign Workers or where Voter Didn't Know How the Campaign Worker Voted His or Her Ballot

(18) Lucille Strong
(19) Freddie Strong
(20) Sharon Anderson
(21) Kenneth Lee Strong
(22) Alice Marie Julian
(23) Willie Paul Cherry
(24) M.C. Cherry
(25) Chester Fontenot

Should the Court find in Appellants' favor on the secrecy argument, these ballots should be held to have been illegally-cast and the pro-incorporation total reduced accordingly.

2. *The Hand-Carried Ballot Challenges*

Of the 25 ballots admittedly voted for incorporation, a different group of 17 is shown by Findings of Fact 12, 15, 17 and 18 to have been included in the 44 hand-delivered ballots. These are:

(1) Freddie D. Strong (Goodwill)
(2) Lucille D. Strong (Goodwill)
(3) Kenneth Lee Strong (Goodwill)
(4) Robbie Lee Shepard (Goodwill)
(5) Alice Julian (Goodwill)
(6) Sharon D. Anderson (Goodwill)
(7) Calvin Dixon (Oakes)
(8) Matielda Dixon (Oakes)
(9) Geraldine Gadlin (Oakes)
(10) Mary (Owens) White (Oakes)
(11) Grant White (Oakes)
(12) Rosa Lee Ahern (Satterwhite)
(13) Ann Brandon (Satterwhite)
(14) Betty Brandon (Satterwhite)
(15) Luberta Brookter (Satterwhite)
(16) Mary Hall (Davis)
(17) James Fields (Davis)

If the Court finds that the hand-carried ballots were illegally-cast, these 17 ballots should be deducted from the pro-incorporation total.

CONCLUSION

In conclusion, Appellants respectfully submit that the Trial Court was in error in its Conclusions of Law, even assuming that its Findings of Fact were both correct and supported by evidence at trial.

The Trial Court never really addressed the secrecy issue, either in the Court's oral decision on September 14 or in the Findings of Fact and Conclusions of Law crafted by Respondents' counsel to attempt to conform to that oral decision.

The Court's true reasoning is perhaps best reflected in the Court's preliminary comments to the Findings and Conclusions.

The Court found the election to have been:

(1) "highly violative, to say the least."

(C.T., page 485, line 21.)

(2) "It is also to be noted, the harassment of voters; the reluctance of voters to come and testify in a court of law; the lapses of memory of those who did testify, some testifying as the result of the issuance of bench warrants; and the zeal of the opponents to the (in)corporation paint an appalling picture."

(C.T., page 487, lines 10-14.)

"It is also of some importance, that these lawsuits were financed not by citizens of the community, but landowners and that the ballots in question were cast by tenants."

(C.T., page 487, lines 22-25.)

Not one of these three points is relevant to whether votes were illegally cast, or whether malconduct occurred.

An election contest is a judicial inquiry to simply determine whether proper procedures were followed in accordance with the election law. It is not a question of the merits or motivation on either side. The proceedings are *not* of an ordinary adversarial character, such as those maintained between individuals asserting personal rights or interests, but involve the right of the people to have the fact as to who has been duly elected by them judicially determined. *Norwood v. Kenfield,* 30 Cal. 393 (1866); *Minor v. Kidder,* 43 Cal. 229 (1872); *Coglan v. Beard,* 67 Cal. 303 (1885); *O'Dowd v. Superior Court of San Francisco,* 158 Cal. 537 (1910).

The Trial Court's remarks above quoted indicate that the Court, as the trial progressed, *did* come to treat the issue as an ordinary adversary proceeding. At one point, the Court characterized Contestants' motivation as "sour grapes" (R.T., page 3135, lines 24-26).

The Court's citation of *Curtis v. Board of Supervisors,* 7 Cal.3d 942 (1972) as "most appropriate" to the issue is, in effect, characterizing the issue as one between property owners and tenants, rather than a public inquiry into election procedures.

As Respondent City's Brief argued (at page 49):

> "The trial judge slowly came to see that the voters were confused and afraid, that their memory of the voting process was poor and that they were caught in a political dispute which had disrupted their community."

And at page 50:

> "The court slowly began to believe that the Contestants' evidence and testimony was not trustworthy."

For purposes of this appeal, let us assume that Respondent City's counsel is correct; that Contestants including Mrs. Wilks who received the highest number of votes in the City Council election, were bad people, that they shouldn't have filed their contest, that they shouldn't have inquired of their neighbors as to how the absentee ballots were procured or the manner of their voting and delivery, that their testimony was unbelievable, that they were financed by white landlords against black tenants. (Note the Court's remark at page A-36, lines 18-25 of the Reporter's Transcript.) With all of these conclusions, the people of East Palo Alto are still entitled to a judicial declaration that the contested ballots were either legally or illegally cast and that official malconduct did nor did not occur.

These legal conclusions can be reached solely from the Court's Findings of Fact; the trial record need be consulted solely for amplification and clarification of those Findings.

The crucial issues before this Court are three:

(1) Is it constitutionally and statutorily permissible in California for campaign workers to go unsolicited into voters' homes, invite the voters to produce their ballots and actually "punch out" those ballots themselves if the voters do not object?

(2) Is Elections Code § 1013 unconstitutional in requiring either hand-delivery of ballots by the voters personally or by mail?

(3) Are the two most recent appellate decisions upholding § 1013, *Fair v. Hernandez* and *Bailey v. Davila,* in error?

Dated: March 14, 1984

Respectfully submitted,

Paul N. McCloskey, Jr.
Brobeck, Phleger & Harrison

PAUL N. McCLOSKEY JR.
Paul N. McCloskey, Jr.
Attorneys for Contestants
and Appellants Gertrude
Wilks, et al.

DECLARATION OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is Two Embarcadero Place, 2200 Geng Road, Palo Alto, California 94303. On March 14, 1984, I served APPELLANTS' REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEAL on the parties to said action by placing a true copy thereof in a sealed envelope, with postage fully prepaid thereon, in the United States mail at San Francisco, California, addressed as follows:

Thomas Daniel Daly, Esq.
Assistant District Attorney
Hall of Justice and Records
Redwood City, CA 94063

Thomas R. Adams, Esq.
Adams, Broadwell & Russell
400 South El Camino Real
Suite 580
San Mateo, CA 94402

Clerk of the Court
San Mateo Superior Court
Hall of Justice
Redwood City, CA 94063
Attn: Honorable John F. Cruikshank, Jr.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on March 15, 1984.

JOHN B. KEATING
John B. Keating

DECLARATION OF SERVICE
HAND DELIVERED

I am a citizen of the United States, over 18 years of age, and not a party to the within action. My business address is Two Embarcadero Place, 2200 Geng Road, Palo Alto, California 94303. On March 14, 1984, I served APPELLANTS' REPLY BRIEF AND BRIEF IN RESPONSE TO CROSS-APPEAL on the parties to said action by causing it to be hand-delivered in a sealed envelope, addressed as follows:

California Supreme Court
Room 4250
State Building
San Francisco, CA 94102

(7 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California on March 15, 1984.

JOHN B. KEATING
John B. Keating

A-115

In the
Supreme Court
of the
State of California

No. A024878

Gertrude Wilks, L.A. Breckenridge,
Arn Cenedella, Eulesley Reece,
Edward Johnson, Leon Abernathy,
Joe Sanders, Roy Lee Ashford,
Mary L. Owens White and Grant White,
Respondents and Appellants,

vs.

Barbara A. Mouton, Ruben Abrica,
Frank Omowale Satterwhite,
James A. Blakey, Jr., City of
East Palo Alto and County of San Mateo,
Petitioners and Respondents.

Answer to Petition for Hearing By Respondents and Appellants Gertrude Wilks, et al.

On Appeal from the Judgment of the Superior Court of the
State of California, County of San Mateo,
Honorable John F. Cruikshank, Jr., Judge

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Answer to Petition for Hearing By Respondents and Appellants Gertrude Wilks, et al.

I.

PRELIMINARY

This is an election contest involving a unique new method of campaigning for absentee ballots hitherto unknown, or at least unreported, in California history.

Absentee ballots obtained in this unusual new manner determined the result in a close election for incorporation of the City of East Palo Alto.

The petitions to this Court present three legal questions for review:

Question 1: In view of the California Constitution's mandate: "Voting shall be secret," and Election Code § 29645's prohibition against individuals interfering with the secrecy of the ballot process, is it lawful for campaign workers for a ballot measure to go, unsolicited, to the homes of voters known to have received absentee ballots, and there volunteer to "assist" those voters in the casting of their ballots, even to the extent of themselves punching out the ballots for the voter?

The trial court accepted as legally cast 17 such ballots, admittedly punched out by the campaign worker not the voter, and 28 others "assisted" by the campaign worker. The Court of Appeals reversed, concluding, as a matter of law, that the secrecy of the 45 ballots so cast had been compromised and that the ballots should be invalidated under the rule of *Scott v. Kenyon*, 16 Cal.2d 197 (1940).

Question 2: Under Elections Code § 1013, requiring that absentee ballots be returned to the County Clerk by the voter "by mail or in person," can campaign workers lawfully return absentee ballots to the Clerk?

Fair v. Hernandez, 138 Cal.App.3d 578 (1982) (hereafter referred to as "*Fair II*"), a case where no fraud or tampering was involved, had held squarely that ballots so returned were illegally cast, the 11 votes so invalidated thereby changing that election result.

Beatie v. Davila, 132 Cal.App.3d 424 (1982), cited in *Peterson v. City of San Diego*, 34 Cal.3d 225 (1983) had likewise justified the protective requirements of § 1013.

The trial court held that neither Elections Code § 1013, *Fair v. Hernandez* nor the *Beatie v. Davila* reasoning applied, and that *if* applied, § 1013 would be unconstitutional.

The Court of Appeals reversed, upholding § 1013, *Fair v. Hernandez* and the *Beatie v. Davila* reasoning, and invalidating 44 ballots delivered by campaign workers as illegally cast.

Question 3: Can the County Clerk knowingly mail absentee ballots to the address of a known campaign worker rather than the address of the voter, in view of the requirement of Elections Code § 1007 that the Clerk deliver absentee ballots to the voter by mail or in person?

The trial court ruled that 15 ballots mailed to the campaign worker's address were properly delivered.

The Court of Appeals reversed, invalidating these 15 ballots.

The Court of Appeals decision remands the case to the trial court to determine how the illegally cast ballots were voted, pursuant to the procedures approved in *Canales v. City of Alviso*, 3 Cal.3d. 118 (1970).

II

STATEMENT OF THE CASE

Respondents, ten electors in East Palo Alto, contested the election to incorporate their community which was held on June 7, 1983. The ballot measure for incorporation passed by 15 votes out of over 3500 ballots cast.

Absentee ballots were the determining factor.

Votes cast in precinct polling places on election day opposed incorporation, 1678 to 1599. The absentee ballot count, however, was 183 to 89 *for* incorporation, the 2 to 1, 94-vote margin thus turning a 79 vote defeat into a 15 vote victory.[1]

Contestants' case and this appeal center on 97 absentee ballots which were solicited, obtained and delivered by six individual pro-

---

[1] The trial court reduced this margin to 13 votes by reason of certain residency challenges, but 2 of the pro-incorporation votes were restored by the Court of Appeal, bringing the margin again to 15 votes. Respondents and appellants do not contest the validity of the Court of Appeal's decision with respect to these 2 votes.

incorporation leaders or workers aligned with the East Palo Alto Citizens Committee on Incorporation (EPACCI).

The facts of the EPACCI procedures were not disputed.

Five EPACCI workers, Chairperson Carmeleit Oakes, Joseph Goodwill, Brad Davis, Frank Omowale Satterwhite and James Blakey, solicited voters to sign absentee ballot applications prepared by EPACCI, which were then taken or mailed to the County Clerk's office by the sixth EPACCI worker, Onyango Bashir (C.T. 489; 491-494).

In 15 instances, Goodwill's business address, 1493 E. Bayshore, or residence address, 710 Runnymede, was written in, in different handwriting, on the absentee ballot application as the address of the voter to whom the County Clerk should mail the absentee ballot materials (Opinion 15-16). The Clerk asked the District Attorney for an opinion on the mailing to Goodwill's business address, and thereafter mailed the 15 contested ballots to Goodwill (R.T. 3127:18-3129:20).

Following submission of the application forms, Oakes and Goodwill followed a procedure whereby they would wait until they believed the Clerk had returned to the voters the actual absentee ballot materials (C.T. 491-492). They would then go to the voters' homes, often two or three times, to "instruct" or "assist" the voter in the casting of his or her ballot. Confronted by Goodwill or Oakes on their doorstep, many voters would get out the absentee ballot materials and permit the campaign worker to punch out all or part of the ballot (C.T. 491-494).

At a senior citizens federally subsidized housing center in East Palo Alto, Runnymede Gardens, the manager, Brad Davis punched out the ballots of 2 elderly voters (C.T. 494) and at Davis' request, city council candidate Omowale Satterwhite came to the senior housing center and there, by his own testimony, at a *public* meeting, punched out the ballots for 4 voters and assisted 2 or more others in so doing (C.T. 493-494).

The Court of Appeal found 17 ballots to have been punched out by the EPACCI worker rather than the voter, and 28 to have

been "assisted." This was consistent with the Trial Court's findings of fact (C.T. 491-494).

In a number of instances, with ballots handled either by Oakes or Goodwill, the voter testified that he or she had never seen a ballot card nor punched one out, or that the campaign worker had punched the ballot in a manner unbeknownst to the voter.[2]

The trial court ruled that each of these 45 ballots[3] was cast with the voter's "understanding and consent" and reflected the voter's "decision" of "wishes" (Findings of Fact 10 and 15; C.T. 491-493).

Forty-six of the absentee ballots so obtained by Goodwill, Oakes, Satterwhite and Davis, including a number of those they had punched out or assisted the voter in punching out, were delivered by Goodwill (30), Oakes (5) and Davis (11) to a vacant desk at EPACCI campaign headquarters at 321 Bell Street where they remained until the next weekday afternoon pickup (C.T. 492-496). This desk was characterized as belonging to "everybody" by one of the EPACCI witnesses (R.T. 631:16-21). Indeed, there were four separate organizations which used the building and had access to the desk during this period, including the East Palo Alto Chamber of Commerce of which Goodwill was president (R.T. 1505:1-5; 1506:1-1507:18). In many cases these ballots passed from the voter through the hands of two or three different campaign workers before being left for an indeterminate time on the desk (R.T. 807:12-26).

From this "everybody" desk, 46 absentee ballots were picked up and hand delivered to the County Clerk's office on weekday afternoons between May 9 and May 24, 1983, by Onyango Bashir (C.T. 495).

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[2] Only in this last category were there significant differences in testimony between Oakes, Goodwill and the voters involved.

[3] This total was reduced to 38 on appeal by virtue of the fact that some challenges were dropped and others fell within other categories of contest.

When Mr. Bashir deposited these 46 ballots in the ballot box at the Clerk's office between May 9 and May 24, he was observed to do so without objection by the deputy clerks present in the room (C.T. 495; R.T. 828:4-9), despite the requirement of Section 1013 of the Elections Code requiring that such ballots be delivered by the individual voter and not by a third party.

Mr. Bashir and Ms. Oakes were deputy county clerks for the purpose of registering voters (C.T. 496-497). Prior to and as of the date of the election, they had *not* been authorized by the Clerk to perform any function other than registering voters (C.T. 496). Messrs. Goodwill, Blakey, Satterwhite and Davis were not registrars (C.T. 497).

On these facts, the Court of Appeal reversed the trial court on 97 absentee ballots, invalidating ballots in three specific categories:[4]

(1) the 46 absentee ballots hand-delivered to the election office by third parties in violation of Elections Code § 1013 and *Fair* II, supra,

(2) 36 absentee ballots not cast in secrecy as required by California Constitution, Article II, Section 7, where voters' rights of secrecy were infringed by pro-incorporation campaign workers in violation of Elections Code § 29645, and

(3) the 15 absentee ballots which were not delivered to the voter in person or by mail from the elections official as required by Elections Code § 1007, but instead delivered to Goodwill.

The Court of Appeal's decision now remands the case to the trial court for determination as to how the 72 invalid ballots were voted, pursuant to the procedures required under *Canales v. City of Alviso*, supra, at page 128.

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[4] By virtue of duplication or invalidation on other grounds in the three categories, the total of 97 is reduced to 72 individual absentee ballots for remand to the trial court.

III
PRELIMINARY OUTLINE OF ARGUMENT

Of the two Petitions for Hearing, that of Petitioner City constitutes 64 pages and appears to include all of the points made in Respondent County's 26 page Petition. Respondents will therefor frame their points in answer to both Petitions in the order raised by Respondent City, but treating the legal contentions in the order appearing in the Court of Appeal's decision.

From a standpoint of the legal issues involved, petitioners have asked this court to squarely overrule the 1982 case of *Fair* II and, further, to overrule the Court of Appeal's enforcement of Elections Code, §§ 1013, 1007 and 29645, as well as the provision of Article II, Section 7 of the California Constitution that "Voting shall be secret."

Petitioners likewise challenge the Court of Appeal's reliance on six additional California election contest decisions:

Peterson v. City of San Diego, 34 Cal.3d 225 (1983); *Scott v. Kenyon*, 16 Cal.2d 197 (1940); *Canales v. City of Alviso*, 3 Cal.3d 118 (1970); *Fair v. Hernandez* ("*Fair* I"), 116 Cal.App.3d 868. (1981); *Beatie v. Davila*, 132 Cal.App.3d 424 (1982); and *Shinn v. Heusner*, 91 Cal.App.2d 248, (1949).

On factual grounds, petitioners attack the Court of Appeals for allegedly making "prejudicially inaccurate statements regarding the facts," and reaching "different factual conclusions than did the trial judge."

This is an unfounded charge, and respondents desire to meet it at the outset.

IV
PETITIONERS CLAIM THAT THE COURT OF APPEAL HAS MADE FOUR MISSTATEMENTS OF FACT, SUBSTITUTING ITS OWN FINDINGS FOR THOSE OF THE TRIAL COURT

At pages 21 and 22 of Respondent City's Petition, it is flatly contended that the Court's opinion makes four statements which

are "prejudicially inaccurate statements regarding the facts" and that the Court of Appeal reached "different factual conclusions than did the trial judge."

Petitioners err.

The four statements in the Opinion and their factual support in the record are set forth below.

1. "*Some of these voters apparently never actually . . . even received their ballot cards.*" (Opinion, page 11.)

This finding by the Court of Appeal was supplementary to the findings of the trial court but not in derogation of the trial court's findings.

While the trial court found that all of the challenged absentee ballots *reached* the voters to whom they were addressed, there was no specific finding on the ballot cards themselves. A number of voters who admitted signing the ballot *envelope* testified specifically that they did not receive and punch out the cards themselves, and their testimony was either uncontroverted or confirmed by the EPACCI campaign workers themselves.

The Reporter's Transcript contains a number of such cases, of which five should suffice to support the Opinion's statement challenged by petitioners.

(a) *Alice Harvey*, who received her absentee ballot materials by hand delivery from Joseph Goodwill, gave uncontroverted testimony as follows:

"Q. Did you—did you open the package to see what was in there?

A. It was a white paper in there, I think white, something with holes in it. I don't know what it is. He said, Just sign it, and I don't have to do anything. I just sign it and gave it to him."

(R.T. 1550:17-22.)

"Q. When you say that you signed the envelope and gave it to Mr. Goodwill, did you do anything else with regard to the materials that were in the package other than sign the envelope.

A. No."

(R.T. 1550:12-16.)

(b) *Roy Ashford* testified:

"Q. Mr. Ashford, have you ever seen a card like Exhibit 6-G?

A. Never seen one."

(R.T. 1674:10-12.)

Asked about how Ashford's ballot was cast, campaign worker Goodwill testified:

> "Yes, I punched it out, his computer card at his request not knowing that he . . . I know he didn't have that much education at that time. . . ."
>
> (R.T. 1104:1-3.)

(c) *Anitra Gilbert's* testimony was uncontroverted. She never saw the punch card ballot until her deposition (R.T. 124:24-125:11). Her testimony was remarkably similar to Ms. Harvey's:

"Q. What did Mr. Blakey tell you when you had signed the envelope?

A. I asked him if that was all I had to do, and he said 'Yes,' and I left.

Q. And you understood when you signed it, then that you would not have to go down to the church and vote election day?

A. Yes.

Q. That you had already voted?

A. Yes.

Q. But you didn't poke a hole in any cards, you didn't put a card in the envelope?

A. No, I did not.

Q. Was there anything in the envelope at the time you signed it?

A. I don't know. I didn't look inside. I just signed it.

Q. Was the envelope sealed when you signed it?

A. No. No, it was not.

Q. And you were relying on Mr. Blakey's statement to you that by signing these two documents, that was all you had to do to vote?

A. Yes."

(R.T. 126:12-127:8.)

(d) *Matielda Dixon* testified with respect to the unsolicited visit to her home by EPACCI Chairperson Oakes:

"Q. And what happened the second time she came?

A. Oh, she did—she just came and brought that paper. That's all.

Q. Did she—did she bring you or show you a card like Exhibit 6G?

A. No.

Q. Have you ever seen a card like that?

A. No, I hadn't."

(R.T. 170:2-11)

* * *

"A. Well, she just told me—showed me this here ballot and say, I suppose, you know, vote yes.

Q. And you're referred here to Exhibit 3. This is what she talked about with you?

A. Mm-hmm.

Q. But she didn't show you any card?

A. No.

Q. And she didn't poke holes in any card in your presence?

A. Not in my presence.

Q. And you didn't poke holes in any card?

A. No, I didn't."

(R.T. 172:18-19.)

(e) *Freddie Strong* testified as follows:

"Q. Now, before you signed the envelope, Exhibit 115-A, what did you actually do in order to vote, besides sign your name?

A. I had looked at the ballot there, and I just made up my mind what I—I wanted to vote for, and I just wrote my name in there on whatever I wanted, Yes or No.

Q. And how did you cast the vote? Besides signing your name, did you sign any other pieces of paper?

A. I just marked "No"—a "Yes"—I marked "Yes."

Q. Well, let me ask you this: Have you ever seen a card like this that I show you now, Exhibit 6-G? Ever seen a card like that before?

A. Well, I don't think I recognize that one.

Q. You don't think you recognize this one?

A. (Witness shakes his head negatively.)

Q. Did you ever poke holes in a card like this?

A. Did what?

Q. Did you ever poke holes in a card like this?

A. Give me the card. No.

Q. No? Who was present when you voted?

A. Well, no one. I just had a card that I signed and passed—have it mailed.

Q. And do you remember who you gave the card to after you signed it?

A. Sure.

Q. Who?

A. I think I gave it—

THE COURT: Speak up, sir.

THE WITNESS:—Goodwill. He was—he was out in front of the house when I—the morning or two before election, and he

was crossing over from the store, and I asked him to mail it for me.

MR. McCLOSKEY: Q. You asked him to mail this envelope—

A. My envelope.

Q. —that you had signed, Exhibit 115—

A. Like this.

Q. —115-A?

A. It seemed to have been a brown card.

Q. Brown card?

A. Um-hmm.

Q. But you're sure you didn't poke any holes in a card like this Exhibit G?

A. No.

Q. 'No' meaning you didn't poke any holes in a card?

A. (Witness shakes head negatively.)

Q. Did anyone, in your presence or at your direction, poke holes in a card like this 6-B?

A. No." (R.T. 1411:131413:18.)

No contrary evidence was presented to refute the testimony in the foregoing five cases. Only Ashford was a contestant; the other four witnesses were not. Their testimony obviously supports the Court of Appeals finding that "some" voters did not receive their ballot cards."

2. "*Many (voters) did not (request assistance) but were nevertheless in effect forced to a decision under intimidating circumstances, in the presence of campaign officials.*" (Opinion, page 12.)

This is a legal conclusion and there is nothing in the Trial Court's findings of fact which refutes this statement. Indeed, the

truth of the Opinion's conclusion would seem to be *confirmed* in the Trial Court's findings:

(a) "Joseph Goodwill distributed approximately 79 absentee ballot applications. . . . Mr. Goodwill got back in touch with the voter. . . ." (Finding of Fact No. 9; C.T. 491:1-6.)

(b) "In *some* instances the voter asked Mr. Goodwill for instructions about the voting procedure . . . in *some* instances . . . the voter asked Mr. Goodwill for help completing the absentee ballot. . . . (Finding of Fact No. 10; C.T. 491:10-14, emphasis added.)

(c) "Mrs. Carmeleit Oakes . . . visited those five voters. . . . She was invited into their homes. She offered to help them with their absentee ballots." (Finding of Fact No. 15; C.T. 492:18-22.)

The Opinion in effect finds that the *process* pursued by the EPACCI campaign workers as described in the Findings of Fact and trial record forced voters to a decision under intimidating circumstances, those circumstances being the unsolicited visit of an aggressive campaign worker to their homes who offered to help them them cast their absentee ballot. The whole record, unrefuted by any finding of the trial court, certainly supports the conclusion reached in the Opinion, particularly with respect to elderly, handicapped or unsophisticated voters.

A second basis for the conclusion of law reached by the Court of Appeals lies in the conceded fact that the EPACCI workers acted in violation of Elections Code § 29645 which makes it a felony to interfere with the secrecy of voting. This in itself was intimidating conduct. Petitioners have studiously avoided any reference to § 29645 in their petitions.

3. "*Many voters received heavy-handed and we think improperly suggestive if not outrightly coercive assistance . . . we note the silence of the record.*" (Opinion, page 14 and footnote 9.)

Again, this is a legal conclusion, not in contravention of any finding of fact by the trial court, and amply supported by the flagrant violation of § 29645 by the EPACCI workers and the whole record which was before the Court. The "improperly suggestive if not outrightly coercive assistance" conclusion is

perhaps best reflected in the words of EPACCI chairperson Oakes, dercribing her visit to Mr. and Mrs. Dixon

"Q. So when you went in the second time, what happened when you went into the house?

A. They greeted me. They said, 'Oh, I remember you. You did take in my request for the absentee ballots. You know, I have it.'

I said, 'Well, I thought you would have it.' *You know, they didn't know I was coming.* (Emphasis added.)

I said, 'I thought you would have it, because I know I received mine.'

Q. Mm-hmm.

A. 'And so if you need some instructions, I will be happy to help you.'

Q. You would be glad to help them out?

A. Yes.

Q. So what did they do then?

A. They got their ballots. They got their ballot out and —"

(R.T. 523:8-24.)

* * *

"Q. So in terms of handling the ballot, did you start with the measure—

A. Yes.

Q. —or did you start with—

A. Yes, and I can tell you why. That—that's the most important. We simply had to create a city. After all, understand, now, that—and in talking with these people, I said, you know, I've done a lot of walking, a lot of walking for incorporation, but, really, I wasn't walking for myself, I was walking for unborn generations.

I say, 'You see these babies here, you see your baby, this baby,' I said, 'They are the ones who are going to profit when we become a city.'

(R.T 530:19-531:15.)

Thus, in making the unsolicited visit, in asking the voters to get out the ballots, in arguing strongly how the vote should be cast, all while she was punching out the ballot for the voter, the EPACCI chairperson *herself* supports the Opinion's conclusion of "improperly suggestive if not outrightly coercive assistance."

4. *"the assistance ' provided by EPACCI campaign workers . . . in some case(s) virtually—and in rarer instances actually—resulted in voting by proxy."* (Opinion, page 15.)

Again, the testimony cited on previous points clearly justifies this legal conclusion.

V

The 46 Absentee Ballots Delivered to the County Clerk by EPACCI Campaign Workers

Elections code § 1013 is clear and unambiguous. In pertinent part, it reads:

> "After marking the ballot, the absent voter may return it to the official from whom it came *by mail or in person. . . .*" (Emphasis added.)

As the Court of Appeals notes, at pages 7-8 of its opinion:

> "In *Fair v. Hernandez* (1982) 138 Cal.App.3d 578, eleven absentee ballots were delivered to the county clerk by campaign workers rather than by the absentee voters themselves. And while no actual fraud was shown, the invalidation of the tainted ballots and consequent reversal of the election result was justified in the following terms: 'Reason and authority both support the judgment of the trial court that delivery by a third party to the city clerk was improper under the statute. *The rule requiring personal delivery clearly serves the para-*

mount purpose of preserving secrecy, uniformity, and integrity of the voting process.' (*Id.*, at p. 583.)"

"The trial court here declined to follow *Fair v. Hernandez*, *supra*, apparently principally because it found no fraud or tampering with respect to the 46 challenged votes at issue. Impliedly, the court read *Fair v. Hernandez* as involving actual fraud, but *we are able to discern no such conduct in that case, and find it precisely factually analogous to the case at bench.*"

(Opinion at pages 7-8, emphasis added.)

The most cursory review of *Fair* II confirms the correctness of the Court of Appeals on this point and the corresponding misstatement by petitioners.

The Court of Appeals further noted that the recent decision of this court, in *Peterson v. City of San Diego*, supra, at page 228, in discussing the secrecy requirements of the Elections Code, specifically mentioned § 1013 "with apparent approval."

In effect, petitioners City and County now ask this court to nullify this court's approval of § 1013 in *Peterson*, to overrule *Fair* II, and to render nugatory the plain language of § 1013.

To do so would make hollow indeed the statutory right of electors to contest specific votes on the basis they were illegally cast. If protection of secrecy justifies the legislative direction that only the voter can hand-deliver his or her ballot, does it not follow inexorably that a ballot hand-delivered by a campaign worker is illegally cast?

Petitioners claim further relief on the basis of Elections Code § 23558's provision: "No informalities in the conduct of the general district election or any matters related to it shall invalidate the election if fairly conducted."

It is difficult to conceive that breach of a provision protecting the secrecy and integrity of the ballot process itself is merely an "informality." Petitioners cite no authority to so suggest.

Furthermore, contestants are not seeking to invalidate the *election*; they seek only to exercise their statutorily-created right

to contest *specific votes* as having been illegally cast. When the illegally-cast votes are deducted under the *Canales* rule, the election itself will still be valid.

Petitioners fail to mention that their proposed interpretation of Elections Code § 1013 would specifically overrule the reasoning of *Beatie v. Davila*, supra, also noted with approval by this court in *Peterson*, supra.

Beatie construed Elections Code § 1013 language allowing the absentee voter to return his ballot "by mail or in person" to mean that the voter could give his ballot to a 3rd person to *mail*, although conceding that the voter could not give it to a 3rd person to hand-deliver. Confronted with the inconsistency of these two results, the Court applied ordinary rules of statutory interpretation to find that the statute expressly authorized two methods of return, either (1) by mail, or (2) in person.

The Court said, at page 429:

> "One may logically ask: Why would the Legislature require the voter to deliver his absentee ballot personally to the elections official and yet allow him to utilize a third party for mailing it to the official. We think the answer to the question is clear. The Legislature recognized the impossibility of policing the act of mailing by the absentee voter. . . ." (*Beatie v. Davila*, supra, at page 429.)

Thus, *Beatie v. Davila*, squarely confirms the validity of *Fair* II's reasoning that the Legislature properly prohibited utilization of a 3rd party for hand-delivery . . . an act which the election official *could* police, and for which he would presumably be guilty of malconduct if he did not, precisely the facts of the case at bench as regards the 46 ballots delivered by EPACCI worker Onyango Bashir.

The Bootstrap Argument that Beatie and Fair Together Create an Unconstitutional Distinction

Petitioners argue that if *Beatie v. Davila* is correct, it creates an unconstitutional distinction between absentee ballots that can be mailed by third parties as opposed to those hand-carried to the Clerk by third parties. In effect, this argument rejects *Beatie's*

reasoning for the distinction made by the Legislature, but demands that *Beatie* result in overturning the Legislature's clear and plain language prohibiting hand-delivery . . . by itself a perfectly valid prohibition. This is a bootstrap argument. If *Beatie's* reasoning is right, then *Fair* II's prohibition of hand-delivery is acceptable; if *Beatie's* reasoning is wrong, then *both* mail and hand-delivery by 3rd persons is prohibited by § 1013.

Petitioners can't argue that *Beatie* is *both* right and wrong and thereby create for themselves an unconstitutional distinction which *Beatie* itself rejects.

The Due Process Question and Griffin v. Burns

Petitioner City cites *Griffin v. Burns*, 431 F.Supp. 1361 (1977) *aff'd* 570 F.2d 1065 (1978), for its proposition that it is a denial of due process by a state to allow voters to vote absentee ballots and then have the state court hold that absentee ballots were not permitted in the election in question (Petitioner City's Brief, at page 51).

Griffin, however, rested on the court's finding that almost 10% of the voters "were doing no more than following the *instructions* of the officials charged with running the election." (*ibid.* 570 F.2d at 1075).

No such instructions were given in the East Palo Alto election. Four individuals, two of them deputy voting registrars, elected to hand deliver absentee ballots without instruction of any kind.

In effect Petitioners would stretch a court decision invalidating improper *instructions* to voters by election officials into the requirement of an *affirmative duty* on the part of such officials to fully advise voters of all actions *prohibited* by the law. No case has been cited which creates such an affirmative duty, and *Griffin* is not analogous to the case at bench.

Significantly, Petitioners make no comment in their petitions to the square holding of the Court of Appeal in *Fair* I at page 878.

There the court invalidated an absentee ballot which the voter had improperly marked at the explicit direction of an election official.

The court said, at page 878:

> "Neither the registrar nor the court has authority to change the law. It is most unfortunate that the voter is deprived of her franchise through the fault of an official, but no exception exists to cover the circumstance. (*Patterson v. Hanley*, 136 Cal. 265, 276 (1902)). This vote must be deducted from Hernandez, total, reducing it to 791."
>
> (*Fair* I, at page 878.)

In *Griffin*, the state official, not the local official, directed the invalid procedure, and almost 10% of the electorate was involved, not 46 voters out of more than 3500 participating.

Petitioners' argument would allow the perpetrators of this election code violation and malconduct to benefit by their wrongdoing.

VI

"THE SECRECY ISSUE"

"Voting shall be secret." (California Constitution, Article II, Section 7.)

> The secret ballot is 'the very foundation of our election system.' 'The law permitting absent voting is carefully drawn to protect the voter in the secrecy of his ballot, and it would be largely useless if such secrecy is not maintained.' *Scott v. Kenyon*, supra, at page 203."

It is hard to improve on either the *Scott* language or the Court of Appeal's treatment of *Scott* in the Opinion before this court.

The Findings of Fact by the trial court established that the proponents of incorporation set up a deliberate absentee ballot program whereby four individual pro-incorporation leaders, Goodwill, Oakes, Satterwhite and Davis, went unsolicited into the homes of voters unrelated to them and there assisted voters in punching out the voters' absentee ballots, either doing so themselves, or showing the voters how and where to punch the ballots (Findings of Fact 2, 3, 4, 9, 10, 15, 16, 17 and 19).

Petitioners do not deny that 17 of these ballots were punched out, not by the voter but by the visiting campaign worker. Likewise petitioners do not contend that any of these 17 voters were related in any way to the campaign worker who voted their ballot. The evidence at trial indicates clearly that they were not so related (R.T. 1393:4-1394:13.).

A number of additional absentee voters were "assisted" by one of the four EPACCI workers in casting their absentee ballots.[5]

Prior to the case at bench, in only one instance has a California court permitted compromises of the secrecy in the casting of an absentee ballot other than as prescribed in the statute.

This case was *Fair* I, where the court specifically permitted the two voters, each partially physically disabled, to obtain the help of a close relative who lived with them.

The court's precise language is illustrative:

> "The absentee ballot of Augustine Mayoral (exhibit 7) was cast with the assistance of the voter's wife in the privacy of their common home, and only in the presence of each other, when the voter was partially disabled." (*Fair* I, page 878.)
>
> "The absentee vote of Molly Lizarde (exhibit 86) was filled out by Irene Lizarde at the specific request and authorization of the voter, in the privacy of their common home, and only in the presence of each other when the voter was partially disabled." (*Fair* I, page 879.)

These are the *only* two cases in reported decisions where one voter was allowed to cast an absentee ballot for another.

Beatie v. Davila, supra, cited by petitioners, can actually be construed as *supporting* the Court of Appeal's position. The court said:

> "However, if a voter wishes to *disclose* his *marked* ballot to someone else, be it a family member, friend or a candidate's

---

[5] Allowing for ballots invalidated on other grounds, and the dropping of the contest of certain ballots at trial, the total ballots invalidated by the Court of Appeal on secrecy grounds comes to 38 in number.

representative, *he should be permitted to do so.*" (*Beatie v. Davila*, supra, pages 430-431, emphasis added.)

The *Beatie* court further pointed out:

"[A] committee member stood next to the voter while he or she voted and would indicate to the voter the names of the candidates the committee was supporting in the election; however, *a committee member never marked the ballot or told the voter how to make his ballot.* (*Id.*, at 427, emphasis added.)

The clear inference from *Beatie* is that *had* the campaign worker actually marked the voter's ballot, it would have been held to have been illegally cast.

Petitioners also erroneously cite *Shinn v. Heusner*, supra, for the proposition that a candidate was allowed to vote someone else's absentee ballot.

While the *Shinn* opinion refers to the *argument* of appellant that Heusner "went to the home" of one elector who had properly requested such a ballot and "voted this elector" (*id.*, at page 251), the appellate court did not include this allegation in the list of actions the trial court found Heusner to have performed. The court's holding stated simply that no law had been violated where Heusner:

"renders service to the county clerk in the delivery of blank application forms, in receiving applications for absentee ballots, in delivering ballots in response thereto, and in the reception from the voters of their voted identification envelopes and the return of same to the county clerk's office; *all of which duties Heusner evidently performed as one authorized to do so.*" (*Id.*, at page 252, emphasis added.)

A careful reading of *Shinn* thus fails to provide any support for the concept that Shinn was allowed to "vote another's ballot."

For the first time in these proceedings, petitioners raise the issue of the Federal Voting Rights Act of 1965. This was not argued, either in the trial court, the Court of Appeal, or in

petitioners' petition for rehearing, and thus should not be raised here (Rule 29(b), California Rules of Court).

Petitioners cite *Scott v. Kenyon*, supra, but again, *Scott's* precise language strongly supports the Court of Appeal's decision.

In *Scott*, the plaintiff, a candidate for the city council in El Cajon, had originally received 226 votes to 222 for the defendant. Nine of the 226 votes for plaintiff were absentee ballots which were opened, counted and stored by the election officials in a manner which permitted the identity of how each absentee voter had voted to be ascertained by the election officials as well as by unauthorized third persons. There was an opportunity for tampering with the absentee ballots, but no evidence that tampering had occurred.

Even so, the 9 absentee ballots were disqualified since their *secrecy* had been compromised. Thus plaintiff, instead of winning by 4 votes, 226 to 222, was adjudged to have lost by 5 votes, 222 to 217.

The court said:

> "*It will be observed that these statutes are designed to carefully protect the absent voter in his right to a secret ballot, which is the very foundation of our election system.* Great care is taken to provide that, in handling and counting the absent voters' ballots, the same secrecy which surrounds the casting of regular ballots at the polls shall be preserved and maintained." (*Scott*, Page 201, emphasis added.)
>
> * * *
>
> "If the absent voters' law is to achieve its purpose it is of the utmost importance that its terms be substantially complied with. In the long run this is important to all voters, including any who might lose their votes in a particular case. With respect to the votes of absentee voters, it is not only important to be able to tell how they actually voted, but *it is of equal importance that the provisions of law be so carried out that it cannot be told how a particular individual voted.*" (*Scott*, Page 203, emphasis added.)

> "We therefore hold that there must be a substantial compliance with the essential requirements of the absent voters' law with respect to the counting of the votes, and that such substantial compliance does not here appear. It follows that the trial court correctly found and concluded that these absent voters' ballots should not be counted for anyone." (*Scott,* Page 204.)
>
> "While it is unfortunate that any voter should lose his vote when it can be told for whom he intended to vote, it would be equally or more unfortunate to deprive many others of their vote by holding that a substantial compliance with this law is unnecessary. To so hold would be to destroy, by judicial decision, the casting of such ballots." (*Scott*, Page 204.)

It is interesting to note that nowhere in the petition of either the County or the City (nor indeed in the trial court's lengthy decision) is found any argument that Election Code § 29645 did not apply to the conduct of the four EPACCI workers who deliberately sought to punch out or assist voters in the casting of their ballots.

In pertinent part, § 29645 reads:

> "Any person who . . . interferes or attempts to interfere with . . . the secrecy of voting . . . is guilty of a felony."

The silence of the petitions of both the City and the County on this key point is highly significant. The approval of the all-mail ballot by this court in *Peterson* was expressly referenced to the protection against wrongdoing set forth in § 29645, the court noting that as of the date of the court's decision, August 4, 1983, "there has been no showing of significant wrongdoing in absentee or mail ballot voting" (*Peterson*, Page 231).

Satterwhite went to the senior home *deliberately* to assist absentee voters at a *public* meeting in the casting of their ballots. Goodwill and Oakes visited at least *31* homes *deliberately* to instruct or assist the voter in casting a non-secret ballot.

If Elections Code § 29645 prohibiting interference with secrecy is to have any meaning at all, a campaign worker cannot be allowed to go to voters' homes and ask voters to bring out their

absentee ballots, there to be punched by or in the presence of the campaign worker. Yet this was precisely the procedure the proponents of incorporation deliberately followed.

The possibilities for wrongdoing under this procedure are enormous.

The *possibility* of wrongdoing was recognized by the Illinois Supreme Court in *Clark v. Quick*, 377 Ill. 424 (36 N.E.2d 563, 566 (1941)): "Our system requires not only that the ballot must be secret, but that *the voter himself must be given no opportunity to satisfy some other person how he has voted.*" (Emphasis added.)

The EPACCI leaders didn't call, they *visited* the homes of those persons they knew to have received absentee ballots. Many of these people were admittedly unsophisticated, elderly, infirm and some cases illiterate. Counsel for Satterwhite and Blakey, in argument on the first day of hearings, characterized many East Palo Alto voters as "simple people, unsophisticated and generally uneducated" (R.T. A-10 at lines 18-19). Confronted with eager proponents of incorporation on their doorstep, the voters invited them in, got out their absentee ballots and allowed the campaign workers to assist them in punching them out.

It is respectfully submitted that there is, and can be no compelling public reason to allow this procedure which obviously places the burden of claiming secrecy on the voter, *particularly* the elderly, unsophisticated and uneducated voter.

There is a final basis for holding invalid the ballots punched out by the campaign workers.

To permit this process, the trial court found that the voter had "waived" his or her privilege of casting a secret ballot. The dissenting opinion in the Court of Appeal discusses such a waiver.

Waiver, however, is the intentional relinquishment of *a known right after acknowledge of the facts* (*Bohlert v. Spartan Ins. Co.*, 3 Cal.App.3d 113, 118 (1969)); the party *claiming* waiver has the burden of proving it by clear and convincing evidence; doubtful cases will be decided *against* a waiver; the rule of clear and convincing evidence of waiver "is particularly apropos in cases in

which the right in question is one that is 'favored in the law.' " (*City of Ukiah v. Fones*, 64 Cal.2d 104, 107-108 (1966).)

Petitioners contend that these requirements are met by the trial court's finding that the ballots had been cast with the voter's "understanding and consent."

Understanding and consent, however, do not necessarily constitute waiver, unless *knowledge* of the voter's right to a secret ballot was present. The more important the right, the more reluctant the courts have been to find waiver without knowledge. There is no testimony *anywhere* in the record to suggest such knowledge or even the *inference* of such knowledge on the part of any one of the 17 voters that he or she was waiving a constitutional right when the campaign worker was permitted to cast his or her ballot. Indeed, the whole record indicates exactly the opposite with respect to these voters whom respondents' counsel characterized as "simple people, unsophisticated and generally uneducated." (R.T. A-10.)

There is, therefore, no evidence in the record or in the Findings of Fact of support the trial court's Conclusion of Law No. 5:

> "The constitutional rights to a secret ballot and to privacy were not violated because the evidence shows that all of the voters who showed their ballots to third parties or who obtained assistance from third parties did so voluntarily and *waived such rights*." (Emphasis added.)

VII

THE 15 ABSENTEE BALLOTS MAILED BY THE CLERK TO EPACCI WORKER GOODWILL IN VIOLATION OF ELECTIONS CODE § 1007

Petitioner City misstates the facts in stating: "Fifteen absentee voters in East Palo Alto asked that their absentee ballots be sent to them at the home or office address of Joseph Goodwill." (City Petition, page 53.)

Of the 15 individual voters, a number testified that the blank space "Mailing address if different from above" was *blank* when they signed the application form for Goodwill.

Leona Brown so testified (R.T. 3506:19-26), as did Anitra Gilbert (R.T. 120:25-121:2), and Roy Lee Ashford (R.T. 1673:11-17). Melody Whitfield testified that the mailing address was not filled in when she *delivered* the application form to EPACCI (R.T. 2014:16-19), and that she never authorized anyone to insert Goodwill's address thereon (R.T. 2013:22-27; 2014:20-22).

The best evidence of these applications are the application forms themselves, Exhibits in Evidence 10B, 16B, 24B, 25B, 26B, 28B, 57B, 70BP, 71B1, 73B, 74B, 76B, 79B, 82B and 83B. These were before the Court of Appeal, and most of them are obviously in the handwriting of someone other than the voter, and many in different colored ink.

VIII

THE PRAYER FOR PROSPECTIVE APPLICATION OF ANY PROTECTION OF SECRECY DECISION

Petitioner City raises a final argument that seems to concede Petitioners' weakness on the secrecy issue.

Petitioner City prays that any ruling requiring secrecy in absentee voting be made prospective only, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Ralston Purina v. County of Los Angeles*, 56 Cal.App.3d 547 (1976). Petitioner concedes the three factors required: (1) that the decision must establish a new principle of law . . . by deciding an issue of first impression whose resolution was not clearly foreshadowed, (2) that a new retroactive application will not serve the purpose of the new ruling, and (3) the inequity of retroactive application.

The East Palo Alto case meets none of these three criteria. The Constitutional provision and Elections Code § 29645 are clear and unambiguous.

In making their arguments, Petitioners devote a great deal of their arguments to the point that it is in the best interests of the people of East Palo Alto that the incorporation vote be upheld; they totally ignore the constitutional right of dissenting voters, likewise upheld by the U.S. Supreme Court, not to have their

votes wrongfully denied, debased or polluted by the illegally-cast vote of another. *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

The vote *should* be upheld, but only legally cast ballots should be counted. The election process itself, and particularly the protective statutes designed to preserve secrecy and integrity should not be disregarded as "informalities" or "incidental" as petitioners argue. To do so would be to defeat the very purpose of the statutes involved. Under these conditions the statutes must be construed as mandatory, not directory. *People v. Callegri*, 154 Cal.App.3d 856, 866 (1984).

Respondents respectfully urge that the guiding principle in the case at bench should be as *Fair* I. pointed out:

> "Preservation of the integrity of the election process is far more important in the long run than the resolution of any one particular election." (*Fair* I, at page 582.)

Dated: October 17, 1984

Respectfully submitted,

Paul N. McCloskey, Jr.
Brobeck, Phleger & Harrison

By Paul N. McCloskey, Jr.
Paul N. McCloskey, Jr.
Attorneys for Respondents and Appellants

PROOF OF SERVICE
(C.C.P. § 1013a, § 2015.5)

I declare that I am employed in the County of Santa Clara, California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is Two Embarcadero Place, 2200 Geng Road, Palo Alto, California 94303.

On October 17, 1984, I served the attached ANSWER TO PETITION FOR HEARING BY RESPONDENTS AND APPELLANTS GERTRUDE WILKS, et al., on the parties involved in said cause, by personal service or by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California, addressed as follows:

Clerk, Court of Appeal (by mail)
First Appellate District
Division One
State of California
Room 4154 State Building
350 McAllister Street
San Francisco, CA 94102

Clerk, Superior Court (by mail)
County of San Mateo
Hall of Justice and Records
401 Marshall Street
Redwood City, CA 94063
(For delivery to
Judge John F. Cruikshank, Jr.)

Thomas R. Adams, Esq. (by mail)
Ann Broadwell, Esq.
Adams, Broadwell & Russell
400 So. El Camino Real, Suite 580
San Mateo, CA 94402

Thomas Daniel Daly, Esq. (by mail)
Assistant District Attorney
County of San Mateo
Hall of Justice and Records
401 Marshall Street
Redwood City, CA 94063

The Honorable John F. Cruikshank, Jr. (by mail)
Judge of the Superior Court
222 E. Weber Avenue
Stockton, CA 95202

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 17th day of October, 1984, at Palo Alto, California.

CARMEN M. LONGA
Carmen M. Longa

No. 86-927

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

GERTRUDE WILKS, L. A. BRECKENRIDGE,
ARN CENEDELLA, EULESLEY REECE,
EDWARD JOHNSON, LEON ABERNATHY,
JOE SANDERS, ROY LEE ASHFORD,
MARY L. OWENS WHITE and GRANT WHITE,
Petitioners,

VS.

BARBARA A. MOUTON, RUBEN ABRICA,
FRANK OMOWALE SATTERWHITE,
JAMES A. BLAKEY, JR.,
CITY OF EAST PALO ALTO and
COUNTY OF SAN MATEO,
Respondents.

COUNTY OF SAN MATEO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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12 pp

QUESTION PRESENTED

The petition for writ of certiorari presents one question: Should this Court review a California Supreme Court decision which did not rely on, discuss, or even mention any federal law, which applied state law to facts determined by a state trial court, and which upheld votes challenged solely on technical grounds?

LIST OF PARTIES

Petitioners have accurately listed the parties in their petition.

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CITY OF EAST PALO ALTO and
COUNTY OF SAN MATEO,
Respondents.

COUNTY OF SAN MATEO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Respondent COUNTY OF SAN MATEO, a political subdivision of the State of California (hereinafter "the County"), submits this brief in opposition to the petition for writ of certiorari dated November 18, 1986.

OPINION BELOW

The opinion of the California Supreme Court was reported at 42 Cal.3d 400 and is reprinted in the appendix to the petition. The

appellate and trial court decisions were not reported and are also reprinted in the appendix to the petition.

JURISIDICTION

The opinion of the California Supreme Court was filed on August 21, 1986. Petitioners first mailed their petition on November 18, 1986. The Clerk returned the petition on November 19, 1986 for failure to comply with Rule 33.1(d). Petitioners then refiled a proper petition on December 4, 1986.

Petitioners assert jurisidiction under 28 U.S.C. 1257(3). If the second petition was "promptly substituted," then the petition is timely under 28 U.S.C. 2101(c) and Rule 33.7.

CONSTITUTIONAL PROVISION INVOLVED

Petitioners contend this case involves Section 1 of the 14th Amendment to the United States Constitution, which provides in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisidiction the equal protection of the laws."

Petitioners never cited or discussed this provision in the state courts. The County contends this case does not involve any federal constitutional or statutory provisions.

STATEMENT OF THE CASE

A. The California Supreme Court Decided Only Issues of State Law

At an election held on June 7, 1983, local voters decided that the unincorporated community of East Palo Alto should become a city.

Petitioners filed an election contest under California law alleging voter fraud and official misconduct. The trial lasted sixteen days. Over one hundred witnesses testified and over two hundred documents were introduced into evidence.

After this extensive trial, the court rejected petitioners' allegations and found there was no fraud and no misconduct. The court confirmed the election.

Petitioners appealed. An appellate court reversed in a two-to-one decision.

The County and the newly formed City of East Palo Alto then sought review in the California Supreme Court. In a unanimous decision, the California Supreme Court nullified the appellate court's decision and affirmed the judgment of the trial court.

The California Supreme Court did not decide any federal questions. The Court did not rely on, discuss, or even mention any federal case, statute, or Constitutional provision.

B. There Was No Fraud or Coercion in This Election

In their "statement of the case," petitioners quote extensively from a portion of the California appellate court's decision, apparently to satisfy the requirement of Rule 21.1(g) that the statement of the case contain "the facts material to the consideration of the questions presented." (Petition, pp. 3-4) Petitioners misstate the facts. The California Supreme Court nullified the appellate court's decision. The Supreme Court was bound by the trial court's determination of the facts, not the decision of the appellate court. (Appendix to petition, p. A-2; 42 Cal.3d at 404) The Supreme Court stated:

> "The trial court determined that there had been no fraud, coercion or tampering in connection with any of the challenged ballots. The court determined that every voter who had disclosed his ballot to a third party had done so voluntarily. Most voters who disclosed their ballots did so because they needed help in view of their age, infirmity or illiteracy. There was substantial compliance with the essential provisions of the absentee voter provisions of the Election Code. Under these circumstances we will not deprive the individuals who cast the challenged ballots of the exercise of their fundamental right to vote." (Appendix to petition, p. A-14; 42 Cal.3d at 413)

Thus, contrary to Petitioners' claims, there was no voter fraud or coercion in this election.

REASONS FOR NOT REVIEWING THIS MATTER

A. This Case Does Not Present Any Federal Question

This court has certiorari jurisdiction over state court decisions under 28 U.S.C. 1257, which provides that: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Under Rule 17.1, this court will grant review on writ of certiorari "only when there are special and important reasons therefor."

Since the California Supreme Court did not pass upon a federal question, this court will assume "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb,* 451 U.S. 493, 495, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981). Furthermore, even where the state court may have discussed and considered federal law, this Court will not review the decision "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983).

This case does not present any substantial federal question. In fact, this case does not present any federal question at all.

B. The State Court Based Its Decision Solely on State Grounds

In reviewing the decision of the state trial court, the California Supreme Court applied existing California statutes and case law,

as well as one California Constitutional provision, to the facts determined by the trial court. The state Supreme Court determined that:

1. California election laws authorized election officials to mail 15 absentee ballots to addresses specified by the voters although the addresses were not the residence addresses of the voters. (Appendix to petition, pp. A-3-A-4; 42 Cal.3d at 404-406)

2. California Elections Code Section 1013 technically requires the voter to return his completed absentee ballot personally if he decides not to use the mail, but noncompliance with this technical requirement will not disenfranchise voters. (Appendix to petition, pp. A-11-A-13; 42 Cal.3d at 411-412)

3. California case law recognizes that absentee ballots validly may be cast in the presence of or with the assistance of third parties, and no state statute or state constitutional provision prohibits this. (Appendix to petition, pp. A-5-A-10; 42 Cal.3d at 406-410)

Thus, it is clear that the California Supreme Court decided only issues of state law. The court did not decide any federal questions. The court did not rely on, discuss, or even mention any federal case, statute, or constitutional provision.

Since the California Supreme Court did not pass upon a federal question, and since the decision clearly indicates that it is based solely on state grounds, this court should deny the petition for writ of certiorari.

C. Petitioner Never Raised Any Federal Questions in the State Courts

Petitioners contend that "The California Supreme Court's decision squarely challenges the principle of the cases culminating in *Hadley et al. v. Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970)." (Petition, p. 7) In *Hadley,* this Court held that a Missouri statute violated the "one man, one vote" principle because it allowed a school district which contained 60% of the population to elect only three (50%) of the six trustees of a consolidated junior

college district governing board. *Hadley* has nothing to do with this case. This is not an apportionment case. Petitioners' votes have not been diluted. Petitioners have not been denied an equal opportunity to participate in the election. Petitioners' arguments, if accepted, would actually result in the complete disenfranchisement of other voters whose ballots would be invalidated on purely technical grounds.

Petitioners allege that they properly presented a federal constitutional issue to the state courts. (Petition, p. 6) Petitioners did cite *Hadley* on four occasions to the state courts. However, petitioners never raised any argument in the state courts that this case involved federal constitutional issues. Petitioners' mere citation of *Hadley* for the proposition that votes may not be diluted was not sufficient to raise any federal questions in the state courts.

Petitioners claim this case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. (Petition, p. 2) Petitioners did not discuss or even cite these provisions at any stage of the state court proceedings. In fact, petitioners based their election contest exclusively on state law:

> "This case is an election contest, and as such, is of necessity limited to challenges to specific ballots based on specific language in the California Constitution or in California statutes." (Appendix to petition, P. A-87 (Petitioners' Reply Brief in state appellate court))

Since petitioners never even mentioned the federal constitutional provisions allegedly involved in this case, they did not properly present a federal question to the state courts, and their petition should be denied.

D. No Wrongdoing Occurred

Petitioners also cite *Anderson v. United States,* 417 U.S. 211, 94 S.Ct. 2253 (1974); *Duncan v. Poythress,* 657 F.2d 691, (5th Cir. 1981); and *United States v. Morado,* 454 F.2d 167 (5th Cir. 1972). *Anderson* was a criminal case in which petitioners were convicted of conspiracy to cast fraudulent votes under 18 U.S.C. 241. *Morado* was also a criminal case under 18 U.S.C. 241 in

which appellants were convicted of stealing an election and violating state election laws. *Duncan* was a civil rights action holding that Georgia could not disenfranchise the entire state electorate by refusing to call a special election to fill a vacancy in the State Supreme Court when Georgia law clearly mandated such an election. These cases were not cited in the state courts.

These cases also have nothing to do with this case. Here, unlike *Anderson* and *Morado*, the trial court found that no wrongdoing had occurred. Here, unlike *Duncan*, no voters were disenfranchised. In fact, the California Supreme Court refused to disenfranchise voters on purely technical grounds.

CONCLUSION

The decision of the California Supreme Court did not rely on, discuss, or even mention any federal law. The court based its decision solely on state law. Petitioners never made any argument in the state courts, based on *Hadley* or any other federal law, that raised federal questions.

There was no fraud, coercion or tampering in this election. Under these circumstances, the California Supreme Court correctly upheld the election and refused to invalidate ballots on mere technical grounds.

This Court should deny the petition for writ of certiorari.

Dated: January 2, 1987

Respectfully submitted,

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